

Liberalizing International Trade in Services: The Case for Sidestepping the GATT

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I. INTRODUCTION

Fifty years ago, the victorious western Allies sought to establish multilateral international institutions to address root causes of the Second World War and of the Great Depression that had preceded it. To this end, they conceived of the United Nations, the International Monetary Fund (IMF), and the International Trade Organization (ITO). These institutions were to administer, respectively, international political, financial, and trade relations. Unlike the United Nations and IMF, however, the ITO never materialized because postwar governments, including the United States, did not ratify its founding instrument. Consequently, the General Agreement on Tariffs and Trade (GATT),¹ which those governments intended to be an interim arrangement under the administration of the ITO, still governs much of international trade relations.²

The GATT itself, however, was also never officially ratified as a multilateral treaty. Instead, the legal basis for the GATT is an agreement known as the Protocol of Provisional Application (PPA),³ which was intended to permit the implementation of GATT obligations until the ITO came into being. With the failure of the ITO, the PPA became the de facto permanent basis of the GATT.⁴ The GATT grew incrementally with the addition of a secretariat in the late 1940s, initially "leased" from the commission that had been set up in preparation for the creation of the ITO; amendments in the 1950s to make the GATT more workable in the absence of the ITO; and the subsequent addition of an Executive Secretary and periodic "rounds" of tariff

1. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187, 194 [hereinafter GATT].

2. P.W. BERNT & M.B.H. WEISS, INTERNATIONAL TELECOMMUNICATIONS 104 (1993); WILFRED J. ETHIER, MODERN INTERNATIONAL ECONOMICS 227-33 (1983); JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 30-39 (1989) [hereinafter JACKSON, WORLD TRADING]; ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 141-50 (1984); MONOPOLKOMMISSION, HAUPTGUTACHTEN IX 1990/1991: WETTBEWERBSPOLITIK ODER INDUSTRIEPOLITIK, para. 1138 (1992); JOSEPH E. PATTISON, ANTI-DUMPING AND COUNTERVAILING DUTY LAWS § 1.05[1], at 1-18 (1993); JOAN E. SPERO, THE POLITICS OF INTERNATIONAL ECONOMIC RELATIONS 95-99 (3d ed. 1985); Ronald A. Brand, *GATT and the Evolution of United States Trade Law*, 18 BROOK. J. INT'L L. 101, 117-20 (1992); Robert N.H. Christmas, *The GATT and Services: Quill and Ink in an Age of Word Processors?*, 10 FORDHAM INT'L L.J. 288, 288-89 (1986); William J. Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L L.J. 51, 52 n.1 (1987); John H. Jackson, *GATT and Recent International Trade Problems*, 11 MD. J. INT'L L. & TRADE 1, 7-9 (1987) [hereinafter Jackson, *Recent Problems*]; John H. Jackson, *GATT and the Future of International Trade Institutions*, 18 BROOK. J. INT'L L. 11, 15-17 (1992) [hereinafter Jackson, *Future Institutions*]; Lisa S. Klaiman, *Applying GATT Dispute Settlement Procedures to a Trade in Services Agreement: Proceed with Caution*, 11 U. PA. J. INT'L BUS. L. 657, 657 n.2 (1990); Robert A. Pollard & Samuel F. Wells, Jr., *1945-1960: The Era of American Economic Hegemony*, in ECONOMICS AND WORLD POWER 333, 333-36 (William H. Becker & Samuel F. Wells, Jr. eds., 1984).

3. Protocol of Provisional Application of the General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 308.

4. Since the U.S. Congress never ratified the GATT, its status under U.S. law is that of an Executive Agreement. JACKSON, WORLD TRADING, *supra* note 2, at 32-37; Brand, *supra* note 2, at 119-120.

reduction negotiations.⁵

An ad hoc quality still characterizes regulation and liberalization of international trade relations. This is particularly true with respect to international trade in services, as the GATT applies only to trade in goods.⁶ The Group of Negotiations on Services (GNS), conducted in parallel with the recently concluded Uruguay Round of GATT negotiations, does, however, now attempt to extend the GATT approach to services sectors.⁷ Despite the overwhelming importance of services to the gross national product (GNP) and trade of the United States and its similarly situated trading partners, the first round of negotiations for multilateral international services trade liberalization concluded only on December 15, 1993, when the GNS produced a final draft of the General Agreement on Trade in Services (GATS),⁸ which will take effect in 1995 upon ratification by its eighty-eight participating governments.⁹ Future rounds of services trade negotiations are expected to occur in the year 2000 and "periodically thereafter."¹⁰

The United States and its services industries have a strong interest in pursuing and achieving further international services trade liberalization. While the intentions and principles of the GATT-based approach of the GNS are laudable, the inherent flaws of this approach and its failure to distinguish between goods and services suggest that it will not yield optimum results within a reasonable time frame. However, this Article does not present a protectionist argument or propose abandonment of GNS efforts. Rather, it suggests that other avenues for pursuing services trade liberalization may yield more immediate and tangible results.

Drawing on examples from typical internationally traded services such as air transport and telecommunications, Part II of this Article defines services

5. BERNT & WEISS, *supra* note 2, at 104; JACKSON, *WORLD TRADING*, *supra* note 2, at 37-39; SPERO, *supra* note 2, at 94-99; KEOHANE, *supra* note 2, at 147-48.

6. The preamble to the GATT recites goals of the agreement, which include "expanding the production and exchange of goods." Services are not mentioned. GATT, *supra* note 1, pmbi.; see also JACKSON, *WORLD TRADING*, *supra* note 2, at 42; MONOPOLKOMMISSION, *supra* note 2, para. 1143; SPERO, *supra* note 2, at 101; Terrence G. Berg, *Trade in Services: Toward a "Development Round" of GATT Negotiations Benefitting Both Developing and Industrialized Nations*, 28 HARV. INT'L L.J. 1, 2 n.8 (1987); Christmas, *supra* note 2, at 288; Phillip H. Gold, *Legal Problems in Expanding the Scope of GATT to Include Trade in Services*, 7 INT'L TRADE L.J. 281 (1982); Klaiman, *supra* note 2, at 659; Phedon Nicolaides, *Economic Aspects of Services: Implications for a GATT Agreement*, 23 J. WORLD TRADE L. 125, 125 (1989); Richard Rivers et al., *Putting Services on the Table: The New GATT Round*, 23 STAN. J. INT'L L. 13, 14-15 (1987); Jeffrey Schott & Jacqueline Mazza, *Trade in Services and Developing Countries*, 20 J. WORLD TRADE L. 253, 265 (1986); Elaine M. Whitford, *A Rainy Day for the GATT Umbrella: Trade Negotiations on Services*, 14 N.C. J. INT'L L. & COMP. REG. 121 (1989).

7. See *infra* text accompanying note 167.

8. General Agreement on Trade in Services, Dec. 15, 1993, 33 I.L.M. 44 [hereinafter GATS]; see David Dodwell & Lionel Barber, *World Trade Deal Is Cleared: GATT Chief Brings Down the Gavel on Historic Market Liberalisation Accord*, FIN. TIMES, Dec. 16, 1993, at 1; David Dodwell, *Slender Success in Attacking Barriers: Services*, FIN. TIMES, Dec. 16, 1993, at 4.

9. Dodwell & Barber, *supra* note 8, at 1; Martin Wolf, *Doing Good, Despite Themselves*, FIN. TIMES, Dec. 16, 1993, at 15.

10. GATS, *supra* note 8, pt. IV; see Frances Williams, *Never Again, Vow Weary Negotiators*, FIN. TIMES, Dec. 16, 1993, at 7.

and distinguishes them from goods so as to provide a basis for evaluating different approaches to services trade liberalization. Part III examines the obligations and attributes of the GATT-based approach to determine whether it is appropriate for services sectors. Some of the criticisms of the GATT posed here apply equally well to goods sectors. Owing to the inherent drawbacks to the GATT-based approach and the economic differences between goods and services, Part IV proposes an alternative approach for pursuing services trade liberalization.

II. SIGNIFICANCE AND DEFINITION OF SERVICES

Four attributes distinguish services from goods. In empirical terms, services are by far the dominant component of the GNP of developed countries such as the United States and are a major component of international trade. In theoretical economic terms, services are intangible processes that are traded via interaction between producers and consumers in cross-border movements of capital assets or personnel. They are also subject to extensive government regulation and are extremely difficult to measure. The following sections consider each of these attributes.

A. *Significance of Services*

Services are a major component of international trade and, at least for developed countries, the dominant component of the national economy. In the late 1980s, services industries contributed over two-thirds of the national product of the United States and other developed countries.¹¹ Only about 40% of the national product of less developed countries (LDCs) has been attributed to services industries.¹² Services industries employed about 70% of U.S. workers in 1989, a figure that has risen steadily from 48% in 1948.¹³ Indeed, 86% of U.S. job growth between 1960 and 1985 occurred

11. Ronald A. Cass & Eli M. Noam, *The Economics and Politics of Trade in Services*, in RULES FOR FREE INTERNATIONAL TRADE IN SERVICES 43, 45 (Daniel Friedmann & Ernst-Joachim Mestmäcker eds., 1990) [hereinafter RULES]; see also SPERO, *supra* note 2, at 100; Steven F. Benz, *Trade Liberalization and the Global Service Economy*, 19 J. WORLD TRADE L. 95, 97 (1985); Berg, *supra* note 6, at 6; A.F. Ewing, *Why Freer Trade in Services Is in the Interest of Developing Countries*, 19 J. WORLD TRADE L. 147, 149 (1985); Jackson, *Future Institutions*, *supra* note 2, at 11; Jackson, *Recent Problems*, *supra* note 2, at 3; Marianna Maffucci, *Liberalization of International Trade in the Services Sector: Threshold Problems and a Proposed Framework Under the GATT*, 5 FORDHAM INT'L L.J. 371, 375-76 (1981); Rivers et al., *supra* note 6, at 27; Schott & Mazza, *supra* note 6, at 254-58; *Wealth in Services*, THE ECONOMIST, Feb. 20, 1993, at 15-16 [hereinafter *Wealth*].

12. Berg, *supra* note 6, at 15; Ewing, *supra* note 11, at 149; Schott & Mazza, *supra* note 6, at 254-58.

13. This figure rises to 75% if one includes government services, although these are unlikely to be internationally tradeable. BENJAMIN M. FRIEDMAN, DAY OF RECKONING: THE CONSEQUENCES OF AMERICAN ECONOMIC POLICY 190 (1989); see also Gold, *supra* note 6, at 282; Klaiman, *supra* note 2, at 668 n.79.

in services industries.¹⁴

Services production is also the most important of the export sectors of the United States and other developed countries.¹⁵ U.S. services trade, for instance, is estimated to have run a \$60 billion surplus in 1992.¹⁶ In the past ten years, the share of U.S. exports represented by services has risen from 20% to 30%.¹⁷ Empirical research even suggests that services may be less sensitive than goods to cyclical downturns and may therefore provide a buffer against recession.¹⁸

While services represent the dominant component of the GNP and trade of developed countries, they are less dominant in overall international trade. Only about 20-25% of international trade flows are attributable to services.¹⁹ However, one estimate valued the cross-border services business in 1993 at \$900 billion and foreign operations of services companies at more than \$3 trillion.²⁰

B. *Services as Intangible Processes*

Services are intangible processes that effect change, generally in the condition or position, of goods and persons.²¹ Services transactions "do not normally involve transfers of property rights, nor do they 'exhaust' the provider's 'stock' of services."²² Since services are intangible, they are not susceptible to transfer or storage, so production and consumption must occur

14. Benz, *supra* note 11, at 97.

15. Rivers et al., *supra* note 6, at 27; see also P.G.J. KAPTEYN & P.V. VAN THEMAAT, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES 845 (1989) (noting that discussion of services trade liberalization is "very important" to EC as well).

16. Jeffrey E. Garten, *Clinton's Emerging Trade Policy: Act One, Scene One*, FOREIGN AFF., Summer 1993, at 188.

17. *Wealth*, *supra* note 11, at 15.

18. Murray Gibbs, *Continuing the International Debate on Services*, 19 J. WORLD TRADE L. 199, 205 (1985).

19. Christmas, *supra* note 2, at 293; Jackson, *Recent Problems*, *supra* note 2, at 3; Klaiman, *supra* note 2, at 668; Rivers et al., *supra* note 6, at 13; Whitford, *supra* note 6, at 121. This figure is necessarily approximate, given the difficulties in measuring services trade.

20. Dodwell & Barber, *supra* note 8, at 4.

21. For this definitional aspect of a service, see THE DICTIONARY OF MODERN ECONOMICS 400 (David Pearce ed., 1983); see also PHEDON NICOLAIDES, LIBERALIZING TRADE IN SERVICES 9 (1989); KARL SAUVANT, INTERNATIONAL TRANSACTIONS IN SERVICES: THE POLITICS OF TRANSBORDER DATA FLOWS 2 (1986); Jürgen Müller, *An Economic Analysis of Different Regulatory Regimes of Transborder Services*, in RULES, *supra* note 11, at 341, 344. By one view, "[a] service is a change in the condition of a person or a good belonging to some economic unit, which results from the activity of another economic unit, with the agreement of the former." E. WEISMAN, TRADE IN SERVICES AND IMPERFECT COMPETITION: APPLICATION TO INTERNATIONAL AVIATION 41-42 (1990); see also Rachel McCulloch, *Services and the Uruguay Round*, 13 WORLD ECON. 329, 335 (1990).

Financial services illustrate this definition. Financing, brokerage, advising, insurance, currency exchange, and other financial services are themselves utterly intangible. They may be used, however, to effect change in tangible goods and persons. Similarly, aviation services effect a change in the spatial position of goods and persons. Unlike trade in the actual aircraft used to provide such service, the air transport service itself is also intangible.

22. Nicolaides, *supra* note 6, at 126.

simultaneously at the point of production.²³

The need for simultaneous and direct interaction between services consumers and producers is a key difference between goods and services trade.²⁴ Capital assets and personnel of services providers traverse international borders to establish the contact necessary for services trade.²⁵

The projection of capital assets across borders, either temporarily or via foreign direct investment, is often an integral element of services trade.²⁶ Local contracting may substitute for some cross-border movements of capital assets required for services production. In other services industries, cross-border movements of consumers may be a substitute. This will not always be possible, however, and restrictions on the projection of assets will curtail the competitive choices available to a services producer.

Similarly, cross-border movements of individuals may be fundamental to services trade. Functions performed by personnel of services producers include marketing, tailoring a product to customer specifications, providing follow-up service or repairs, and providing the basic service itself.²⁷ As with cross-border projections of capital assets, it may be possible to substitute local contracting for some direct factor movements. But likewise, restrictions on movements of individuals may limit the competitiveness of a services provider.

23. BERNT & WEISS, *supra* note 2, at 98; SAUVANT, *supra* note 21, at 2; WEISMAN, *supra* note 21, at 42; Wilfred J. Ethier & Henrik Horn, *Services in International Trade*, in INTERNATIONAL TRADE AND TRADE POLICY 223, 223 (Elhanan Helpman & Assaf Razin eds., 1991); McCulloch, *supra* note 21, at 335; Müller, *supra* note 21, at 344; Deepak Nayyar, *Some Reflections on the Uruguay Round and Trade in Services*, 22 J. WORLD TRADE L. 35, 37 (1988) ("The producer and . . . consumer must interact with each other, so physical proximity is essential if an international service transaction is to take place.").

For instance, aviation services are not susceptible to storage for later consumption. Rather, a passenger must be on board the aircraft of the service provider at precisely that instant at which the transportation service is being performed in order to experience the relevant change in spatial condition. Similarly, telecommunications services require a connection between the consumer wishing to transmit a message and the network of the service provider at the moment when a communications link is needed.

24. Goods may be transmitted from the producer to the consumer via intermediaries, thereby obviating the need for direct contact between the producer and consumer.

25. See GATS, *supra* note 8, art. I(2) (defining trade in services). Stated in another way, "international transactions . . . may be possible only if there is concomitant international movement of production factors." Nicolaides, *supra* note 6, at 126.

26. Cass & Noam, *supra* note 11, at 50; Ethier & Horn, *supra* note 23, at 223; Maffucci, *supra* note 11, at 382-83; James Markusen, *Trade in Producer Services and in Other Specialized Intermediate Inputs*, 79 AM. ECON. REV. 85, 86 (1989); McCulloch, *supra* note 21, at 335; Ernst-Joachim Mestmäcker, *Free Trade in Services: Regional and Global Perspectives*, in RULES, *supra* note 11, at 9, 13.

For instance, an airline must at least temporarily take productive assets — aircraft — into foreign markets in order to provide the transportation service. An airline may also require longer-term local commitments or investments such as maintenance facilities, offices, and airport space. Similarly, telecommunications services providers may require a satellite ground station or at least the right to transmit their signals into foreign markets. See generally MONOPOLKOMMISSION, SONDERGUTACHTEN 20: ZUR NEUORDNUNG DER TELEKOMMUNIKATION (1991). Engineering or software services providers may require local facilities for installation, follow-up service, or repairs. SAUVANT, *supra* note 21, at 4.

27. For instance, airlines must introduce personnel into foreign markets: pilots, cabin crews, management, mechanics, and the like. Other services industries such as engineering, management consulting, legal advice, information services, construction, and tourism similarly require the movement of people and/or the establishment of a foreign presence. Markusen, *supra* note 26, at 86, 95.

C. High Degree of Government Regulation

The cross-border projections of capital assets and individuals that international trade in services usually entails often raise political concerns of national autonomy and sovereignty, which in turn engender a high degree of trade-inhibiting government regulation. Indeed, a high degree of government regulation is another, if not the most important, characteristic of services.²⁸ Thus, international efforts to reign in national regulatory regimes would have a profound impact in the services context.²⁹

Governments enact restrictions on establishment, foreign direct investment, and international movements of individuals. Generally rigid immigration regulations impede the international movement of persons and thus impede international services trade by restricting the interaction of services providers and consumers.³⁰ In addition, governments directly regulate certain specific services sectors because of their perceived political sensitivity.³¹ Justifications for regulation include consumer protection, standards maintenance, national security, prestige, cultural preservation, competition, immigration control, financial prudence, environmental protection, employment, development, and other political goals.³² While regulation of international goods trade often only involves a simple percentage tariff on cross-border goods shipments, regulatory schemes for services are usually highly technical, detailed, and particular to each sector.

For example, in telecommunications services, comprehensive regulations commonly determine which services may be offered, which companies may compete in offering those services, and what rates they may charge.³³

28. See Cass & Noam, *supra* note 11, at 61-62; see also WEISMAN, *supra* note 21, at 45 ("Perhaps more important than a theoretical definition of services, one must note that regulation of services occurs more frequently than regulation of goods."); Benz, *supra* note 11, at 96 ("[I]n most cases government regulation of services activities are [sic] greater than exists in the situation of merchandise trade."); Klaiman, *supra* note 2, at 673; Maffucci, *supra* note 11, at 383; McCulloch, *supra* note 21, at 342; Müller, *supra* note 21, at 353-54.

29. Mestmäcker, *supra* note 26, at 20. Needless to say, the many local regulatory schemes in existence are a serious impediment to international services trade. Maffucci, *supra* note 11, at 383-84; Rivers et al., *supra* note 6, at 15.

30. Markusen, *supra* note 26, at 95; Mestmäcker, *supra* note 26, at 13; see, e.g., P.S. Randhawa, *Punta del Este and After: Negotiations on Trade in Services and the Uruguay Round*, 21 J. WORLD TRADE L. 163, 168 (1987) (noting complaints by Canada and Japan regarding "restrictive policies of the United States toward foreign nationals entering the United States temporarily for legitimate commercial or professional activities, or in renewing residence permits for engineers and the like, who were engaged in after-sales services").

31. Berg, *supra* note 6, at 3; Klaiman, *supra* note 2, at 673. This rationale has been advanced to justify direct regulation of major services industries such as telecommunications and information transmission and dissemination, transportation of goods and individuals, professional services (corporate management, medicine, legal advice, accounting, engineering), insurance, education, and banking.

32. WEISMAN, *supra* note 21, at 45; Cass & Noam, *supra* note 11, at 61-62; Murray Gibbs & Mina Mashayekhi, *Services: Cooperation for Development*, 22 J. WORLD TRADE L. 81, 96-97 (1988) (listing typical regulatory objectives of developing country governments).

33. See, e.g., BERNT & WEISS, *supra* note 2, at 13-80; MONOPOLKOMMISSION, *supra* note 26; OECD, *TRADE IN INFORMATION, COMPUTER AND COMMUNICATION SERVICES 12-17* (1990); Benz, *supra* note 11, at 104-05; M. Veronica Pastor, *The Problem of International Accounting Rates: The European*

Similarly, in the aviation industry, regulations often govern the fares that air carriers may charge, the types of service they may provide, and the technical and safety standards they must meet.³⁴ Banking service providers are subject to capital requirements, solvency ratios, liquidity rules, ownership rules, educational qualifications, and deposit guarantee rules, as well as restrictions on the types of services that they may provide.³⁵ Other highly regulated services sectors include accounting, advertising, auto and equipment leasing, financial services, and legal services.³⁶

D. *Measurement Difficulties*

Difficulty in gathering data may present the greatest obstacle to understanding service economies and liberalizing trade in services.³⁷ Services trade is difficult to measure for various reasons. First, services do not necessarily enter and exit countries as discrete, quantifiable units at convenient customs ports.³⁸ Second, balance of payment statistics have traditionally not provided sufficiently disaggregated data on international transactions in services.³⁹ For example, internationally traded services that are incorporated into goods trade are not always reported separately.⁴⁰

Difficulties in measuring services trade impede quantification, and consequently comparison, of the value of concessions exchanged in services trade negotiations; this in turn hampers services trade liberalization.⁴¹ Such difficulties become particularly pronounced when, as in the GATT context, negotiations simultaneously cover dozens of unrelated sectors. When the values of reciprocal concessions cannot be quantified or compared, negotiations may degenerate into irrational political exercises not conducive

Commission Steps In, 45 FED. COMM. L.J. 313 (1993); Andrew Adonis & Andrew Hill, *Lifting the Lid on Liberalisation*, FIN. TIMES, May 10, 1993, at 13.

34. Secretariat of the International Civil Aviation Organization, *Applicability or Inapplicability to Air Transport of International Trade Concepts*, in World-Wide Air Transport Colloquium, attachment B, para. 24 (Apr. 6, 1992) (unpublished manuscript, on file with author); see WEISMAN, *supra* note 21, at 4, 12-20, 46; Benz, *supra* note 11, at 106-07.

35. Cillian Ryan, *Trade Liberalisation and Financial Services*, 13 WORLD ECON. 349, 351-52 (1990).

36. Benz, *supra* note 11, at 102-04.

37. *Id.*; see also WEISMAN, *supra* note 21, at 5 ("Data on services is appalling."); Christmas, *supra* note 2, at 295; Klaiman, *supra* note 2, at 671-72; Maffucci, *supra* note 11, at 378; McCulloch, *supra* note 21, at 334; Nayyar, *supra* note 23, at 37 ("[A]ny attempt to measure international trade in services is confronted by . . . serious statistical difficulties."); Schott & Mazza, *supra* note 6, at 254.

38. Benz, *supra* note 11, at 98; Klaiman, *supra* note 2, at 672; McCulloch, *supra* note 21, at 334; Interview with Vannessa Sciarra, Assistant General Counsel, USTR, in Washington, D.C. (Jan. 25, 1993) (The views she expressed were her own and not necessarily those of the USTR.).

39. Nayyar, *supra* note 23, at 37; see also Klaiman, *supra* note 2, at 671-72; Maffucci, *supra* note 11, at 378-79.

40. Christmas, *supra* note 2, at 295; Nayyar, *supra* note 23, at 37.

41. Such concerns prompted France, Italy, and other European countries initially to oppose services trade liberalization. Maffucci, *supra* note 11, at 388.

to reciprocal reductions of comparable trade barriers.⁴²

Given these attributes that differentiate services from goods, it is not surprising that services fall outside the GATT framework. However, the GATT approach is now being applied to services trade liberalization by the GNS through the GATS,⁴³ and the GATT presents the point of origin for most discussions of services trade in the GNS. While the GATS has yet to be tested in practice, obligations within the GATT similar to those under the GATS have developed a track record over the past four decades. For these reasons, this Article turns next to an evaluation of the approach taken by the GATT to determine its suitability for services sectors.

III. THE GATT AS A POINT OF ORIGIN

The GATT embodies the philosophy that international trade liberalization serves the common interest of nations. This overarching principle is distilled into specific rules mandating most-favored-nation (MFN) treatment, national treatment, institutionalized dispute resolution, and multilateralism.

A. Goals of Trade Liberalization

The GATT expressly embraces an economic and political philosophy reflecting

the economic consensus that open trade would allow countries to specialize according to their comparative advantage and thereby achieve higher levels of growth and well-being, and the political consensus that a liberal trading regime would promote not only prosperity but also peace.⁴⁴

42. Two examples illustrate such difficulties:

[W]ould contracting parties which refuse to extend national treatment to foreign banks risk retaliation in the form of the withdrawal of tariff concessions on bananas or orange juice? Such an approach opens a virtual Pandora's Box of coercion and retaliation . . .

Gibbs, *supra* note 18, at 215.

[H]ow is it possible to exchange landing rights in the aviation sector with the right to open branches in the banking sector? Or how is it possible to exchange a relaxation of restrictions on transborder data flows with a relaxation of restrictions limiting the right of doctors to medical practice in foreign countries? Indeed, it is well nigh impossible to conceive a scale which would bring about a progressive reduction of barriers in the context of many service sectors.

Nayyar, *supra* note 23, at 40.

43. See *infra* text accompanying note 167.

44. SPERO, *supra* note 2, at 95; see also ETHIER, *supra* note 2, at 5-46 (reviewing economic advantages to trade liberalization); Richard Blackhurst et al., *The Issue of Further Reductions in Barriers to International Trade*, in *INTERNATIONAL TRADE AND FINANCE* 94-95 (Robert E. Baldwin & J. David Richardson eds., 1981) (reviewing economic advantages to trade liberalization and criticizing counter-arguments); Brand, *supra* note 2, at 104-06; Davey, *supra* note 2, at 53; JACKSON, *WORLD TRADING*, *supra* note 2, at 8-14. According to the Preamble to the GATT, its contracting parties acted

[r]ecognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods.

GATT, *supra* note 1, pmbl.

Open, efficient, and liberalized trade is also seen to require unrestricted transit⁴⁵ and transparency.⁴⁶ Such goals generally also characterize the GATS.⁴⁷

In economic theory, liberalized trade permits countries to realize several types of economic gains. Consumers of products and services that have been more efficiently produced outside the home market gain from access to lower-cost products.⁴⁸ Gains by consumers, who may themselves be *producers* of other products, outweigh losses by those domestic producers who are unable to meet foreign competition, which means that the national economy experiences an overall net gain from trade.⁴⁹ Although certain countries may actually become worse off, the world economy on net will benefit.⁵⁰

Producers gain as they obtain access to lower cost inputs and scale economies.⁵¹ Given the scale economies that characterize services industries, producers located in smaller countries are not necessarily at a cost disadvantage.⁵² Competition forces producers to become more efficient, which likewise brings benefits to consumers and national income. Indeed, such efficiency gains may be the most significant benefit from services trade liberalization.⁵³

Empirical studies of services industries have confirmed the existence of such benefits. They have found that trade liberalization leads to increases in

45. A principle of unrestricted transit means that states will not impede trade involving third parties that merely crosses through national territory. Benz, *supra* note 11, at 115.

46. *Transparency* means that trade regulations, practices, procedures and restrictions are thrust into the public domain on the theory that increased public knowledge simplifies trade transactions and discourages restrictions. BERNT & WEISS, *supra* note 2, at 105; OECD, *supra* note 33, at 28, 31, 48; Benz, *supra* note 11, at 115; Berg, *supra* note 6, at 11; Christmas, *supra* note 2, at 289 n.4; Annie E. Lee, Comment, *Toward Institutionalization of Reciprocity in Transnational Legal Services: A Proposal for a Multilateral Convention Under the Auspices of GATT*, 13 B.C. INT'L & COMP. L. REV. 91, 122 (1990); Maffucci, *supra* note 11, at 398; Nayyar, *supra* note 23, at 39; Nicolaidis, *supra* note 6, at 131; Randhawa, *supra* note 30, at 164.

The GATS includes a specific reference to transparency. GATS, *supra* note 8, art. III.

47. See GATS, *supra* note 8, pmbl.

48. WEISMAN, *supra* note 21, at 2-4, 157-58; Blackhurst et al., *supra* note 44, at 97-98; Schott & Mazza, *supra* note 6, at 259-60.

49. Blackhurst et al., *supra* note 44, at 97-98.

50. Markusen, *supra* note 26, at 95; McCulloch, *supra* note 21, at 339; Gibbs & Mashayekhi, *supra* note 32, at 90-93 (noting fear of LDCs that services trade liberalization may come at their expense); Ryan, *supra* note 35, at 364.

The internationally divergent allocation of gains from trade liberalization, and particularly of gains from services trade liberalization, has raised concerns about potential bias against LDC development. The GATS does specifically address these issues. See GATS, *supra* note 8, art. IV. However, the abundant literature on this subject is beyond the scope of this Article, which is written from the perspective of states with well-developed services industries.

51. See WEISMAN, *supra* note 21, at 2-4, 156-58; Markusen, *supra* note 26, at 85; Schott & Mazza, *supra* note 6, at 260.

52. McCulloch, *supra* note 21, at 339.

53. One commentator argues:

[T]he conventional and tested theory of the gains from trade is broadly applicable to services as well as goods. But the gains from re-allocation of resources [owing to comparative advantage] may be less important than those from better quality of service and stimulus to the inherent efficiency of industry in the importing country through innovation and cheaper inputs.

Ewing, *supra* note 11, at 150.

consumption and in the variety of services available to consumers.⁵⁴ The promise of further such benefits drives current U.S. diplomatic efforts to liberalize trade in such services sectors as air transportation.⁵⁵ The philosophy of mutual economic benefit from trade liberalization governs the GATT-based approach. The GATT, like the GATS, distills this general philosophy into specific rules deemed necessary to achieve trade liberalization and its concomitant economic benefits.

B. *Most-Favored-Nation Treatment*

The MFN clause of the GATT provides:

Any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.⁵⁶

This provision suggests "that any benefits, privileges or concessions granted by one signatory are automatically and unconditionally extended to all signatories to the agreement."⁵⁷ Commentators frequently assert that this MFN obligation of the GATT has had a salutary effect upon international trade.⁵⁸ The GNS consequently imposed a similar unconditional MFN obligation on services in Article II of the GATS,⁵⁹ which is subject to many of the same considerations and criticisms as its counterpart in the GATT. The unconditional MFN obligation is perhaps best evaluated with reference to its track record over the years as an element of the GATT.

Supporters of the MFN clause assert that it inhibits economically

54. WEISMAN, *supra* note 21, at 2-4, 156-58; Müller, *supra* note 21, at 343; Schott & Mazza, *supra* note 6, at 259-60. See generally Berg, *supra* note 6, at 13-14; Ethier & Horn, *supra* note 23, at 235; Nayyar, *supra* note 23, at 45. Empirical studies have found that international agreements liberalizing trade in air transport services have "a positive and significant effect on both the level of passengers . . . and on the rate of passenger growth in a market." Martin Dresner & Robert Windle, *The Liberalization of U.S. International Air Policy: Impact on U.S. Markets and Carriers* 11 (Nov. 1991) (unpublished manuscript, on file with author); see also *infra* note 55.

55. The Assistant Secretary for Policy and International Affairs of the DOT has stated: [T]he comprehensive study of domestic airline competition that DOT completed earlier this year showed that air travelers in the United States today are getting more service to more cities at lower prices than ever before. Our experience with U.S. domestic airline deregulation is what enables us to pursue international airline liberalization with such enthusiasm. We want agreements that expand services, and the enormous economic dividends attributable to these services, for the benefit of the travelling public, our communities, and our aviation industry. We are realizing very positive results from that quest: the markets governed by our most liberal accords are the markets in which we have seen the highest rates of traffic growth. Jeffrey N. Shane, Remarks at SH&E Airline Business Conference on Europe 1992: A Single Aeropolitical Market? 2-3 (Nov. 15, 1990) (transcript on file with author); see also Berg, *supra* note 6, at 13.

56. GATT, *supra* note 1, art. I(1).

57. Secretariat of the International Civil Aviation Organization, *supra* note 34, attachment B, para. 2; see also BERNT & WEISS, *supra* note 2, at 105; JACKSON, *WORLD TRADING*, *supra* note 2, at 133-48; WEISMAN, *supra* note 21, at 77-78; MONOPOLKOMMISSION, *supra* note 2, at para. 1140; Benz, *supra* note 11, at 114; Brand, *supra* note 2, at 121.

58. See, e.g., WEISMAN, *supra* note 21, at 77-78; Benz, *supra* note 11, at 114.

59. GATS, *supra* note 8, art. II; see also BERNT & WEISS, *supra* note 2, at 105-08.

inefficient trade restrictions, reduces the transactions costs of negotiating trade agreements by presenting one rule of general application and by mitigating disputes over the origin of goods, and often induces "a generalization of liberalizing trade policies."⁶⁰ MFN helps countries in poor bargaining positions gain access to liberalization that they might not achieve through negotiations turning solely upon mutual exchange of economically equivalent concessions.⁶¹ Not surprisingly, the MFN clause may well have brought about the dramatic expansion in GATT membership over the past forty years.⁶²

Given these asserted benefits of MFN, one may wonder why major U.S. service industries fiercely oppose attempts to subject them to MFN obligations while simultaneously lobbying to liberalize international trade.⁶³ These service industries are in part motivated by concerns over free riders.⁶⁴ The free-rider⁶⁵ issue arises because an *unconditional* MFN obligation requires each contracting state to treat all other contracting states similarly, regardless of which of the others grant reciprocal trade concessions. For instance, if the United States were to grant one foreign country the right to provide commercial air service to New York, unconditional MFN would grant *all*

60. JACKSON, *WORLD TRADING*, *supra* note 2, at 134; *see also* WEISMAN, *supra* note 21, at 99-100; MONOPOLKOMMISSION, *supra* note 2, para. 1140 (noting that MFN "transfers the benefits of bilateral trade liberalization to third parties . . . thereby produc[ing] positive external effects . . . [and] substantially contribut[ing] to the stability of" GATT) (author's translation).

61. For instance, access to the markets of tiny Luxembourg or the LDCs is worth much less than is access to the United States, the European Union, or Japan. Luxembourg or the LDCs would have difficulty gaining access to valuable air transport markets for their national airlines if they could only offer access to their own national markets as an inducement for liberalization. MFN, on the other hand, affords all parties to an agreement equivalent treatment, regardless of negotiating position. Secretariat of the International Civil Aviation Organization, *supra* note 34, attachment B, para. 5.

62. MONOPOLKOMMISSION, *supra* note 2, para. 1140.

63. *See* BERNT & WEISS, *supra* note 2, at 111-12 (discussing U.S. position on trade in telecommunications services); Letter from Donald C. Comlish, Vice President of International Affairs, Air Transport Association of America, to the Honorable Julius L. Katz, Deputy U.S. Trade Representative 1 (Oct. 24, 1990) (on file with author) [hereinafter Comlish Letter] (claiming to write on behalf of "virtually all of the nation's scheduled airlines"); Letter from Talmage E. Simpkins, Executive Vice President, Labor-Management Maritime Committee, Inc., et al., to the Honorable Samuel K. Skinner, Secretary of Transportation & the Honorable Carla A. Hills, U.S. Trade Representative 1 (Nov. 30, 1990) (on file with author) [hereinafter Simpkins Letter] (commercial aviation, maritime, and trucking industries); Letter from James E. Landry, Senior Vice President and General Counsel, Air Transport Association of America, to the Honorable Julius Katz, Deputy U.S. Trade Representative 1 (Feb. 14, 1992) (on file with author) [hereinafter Landry Letter] (commercial aviation); Letter from Warren L. Dean, Partner, Dyer, Ellis, Joseph & Mills, Washington, D.C., to the Honorable Jeffrey Shane, Assistant Secretary for Policy and International Affairs, U.S. Department of Transportation 1 (Dec. 17, 1991) (on file with author) [hereinafter Dean Letter] (GATS negotiations and air transport services); *see also* Interview with Richard M. Loughlin, Special Assistant to the Director, Office of International Aviation, DOT, in Washington, D.C. (Jan. 25, 1993) (views he expressed were his own and not necessarily those of the DOT) [hereinafter Loughlin Interview I].

64. BERNT & WEISS, *supra* note 2, at 111-12 (telecommunications services); Landry Letter, *supra* note 63 (commercial aviation); Interview with Richard M. Loughlin, Special Assistant to the Director, Office of International Aviation, DOT, in Washington, D.C. (Dec. 13, 1993) (views he expressed were his own and not necessarily those of the DOT) [hereinafter Loughlin Interview II] (commercial aviation).

65. In economic terms, market failure allows a free rider to obtain access to a valuable public good without stating or paying what he is actually willing to pay. *See, e.g.*, THE DICTIONARY OF MODERN ECONOMICS, *supra* note 21, at 166.

other parties to a services accord the right to service New York, whether or not the other states granted U.S. airlines reciprocal access to their own national markets.⁶⁶

The free-rider problem has three major consequences. First, negotiating states cannot use trade concessions made during reciprocal bargaining to induce free riders to open their markets because free riders receive the benefits of concessions whether or not they make reciprocal concessions. Once the United States grants any country access to New York, access to New York falls away as a bargaining chip for use in negotiating U.S. access to restricted cities in other contracting states. Access to U.S. services markets is a valuable benefit, the grant or denial of which U.S. government negotiators and services industries view as a tool for gaining access to foreign markets.⁶⁷ Second, the free rider issue poses a disincentive to trade liberalization.⁶⁸ If U.S. airlines are subject to foreign competition and corresponding losses in domestic market share without necessarily receiving access to valuable foreign markets in return, then the United States will have little incentive to liberalize access to its markets. Third, as countries seek to avoid bestowing unreciprocated benefits upon free riders, agreements may be reduced to the lowest common denominator set by those least willing to eliminate trade restrictions.⁶⁹

Concerns that the unconditional MFN obligation may give rise to significant free rider issues are not specific to international trade in services. These concerns arise in goods sectors covered by an unconditional MFN obligation under the GATT as well. Nevertheless, not all countries are potential free riders, even if their air transport services trade were to be subject to an MFN obligation. Within the European Union (EU), for instance, major airports are open to international air traffic at the very least from other

66. BERNT & WEISS, *supra* note 2, at 111-12 (applying free-riding concept to telecommunications services).

67. According to an Assistant Secretary for Policy and International Affairs at the DOT, [t]here can be no doubt that the success of U.S. negotiators in opening up foreign markets is primarily attributable, first, to the attractiveness of the U.S. market and, second, to the fact that the only way a foreign carrier can obtain new access to *our* market is by opening up *its* market to some greater extent.

Shane, *supra* note 55, at 8; see also Daniel M. Kasper, *Liberalizing Airline Services: How to Get from Here to There*, 11 *WORLD ECON.* 91, 98-100 (1988); Simpkins Letter, *supra* note 63, at 1 (maritime, trucking and commercial aviation industries); Landry Letter, *supra* note 63 (commercial aviation services); Loughlin Interview I, *supra* note 63 (commercial aviation services).

68. According to the Senior Vice President and General Counsel of the Air Transport Association of America, "the absence of most favored nation obligations governing . . . services allow[s] the progressive liberalization of important bilateral relationships without concern for the policies of more restrictive governments The further liberalization of high traffic density aviation markets will be impaired if . . . [restrictive] foreign governments are MFN bound under the GATS." Landry Letter, *supra* note 63, at 1-2; see also Dean Letter, *supra* note 63; Loughlin Interview II, *supra* note 64.

69. According to a U.S. official involved in negotiating air transport services accords, "the sorts of obligations likely to be established [under MFN] may well be 'lowest common denominators' rather than genuine liberalizations. Instead of enhancing market access . . . the agreement as applied to aviation could end up legitimizing restrictive practices" Shane, *supra* note 55, at 6; see also Kasper, *supra* note 67, at 103 (noting "the inherent 'lowest common denominator' problem that plagues the GATT"); Loughlin Interview II, *supra* note 64.

members of the European Union.⁷⁰ Were MFN to govern United States-EU aviation services trade, U.S. airlines would immediately gain access to all of these European cities. Why, then, would U.S. airlines seek to avoid having MFN apply to aviation services trade? There are three reasons.

First, were *unconditional* MFN as contemplated in the GATT to govern worldwide aviation services trade, this obligation could not be limited to trade between the United States and the EU. Instead, MFN would apply to *all* such trade, including trade with free-riding states. One fundamental difficulty with an agreement as broadly multilateral as the GATT is that it does not permit distinctions among countries with radically different economic and foreign trade policies.⁷¹ Second, were MFN to apply to the U.S. market as well, U.S. airlines would face foreign competition, which they seek to avoid.⁷² As in other sectors, aviation services producers and consumers do not share identical interests. The GATT emphasizes reciprocal benefits to industries without incorporating a competition policy to ensure that efficiency gains of trade liberalization accrue to services consumers in addition to services producers.⁷³ Third, many foreign airlines receive government subsidies and other support. Privately owned U.S. airlines naturally wish to avoid competition with such state-supported foreign entities.⁷⁴ As will become apparent below, however, the GATT-based approach may be modified to address free rider and competition issues while at the same time retaining the benefits afforded by MFN.⁷⁵

C. National Treatment

Another of the primary GATT obligations, national treatment, gives rise to considerations similar to those raised by MFN. The national treatment obligation implemented by the GATT states that "foreign suppliers of services shall, in respect of national laws, regulations and administrative practices, be accorded treatment no less favorable than that accorded to domestic suppliers in the same market."⁷⁶ Observers frequently assert that the national treatment

70. This becomes clear with even a cursory review of an airline flight schedule for the European Union. *See, e.g.*, 17 OAG DESKTOP FLIGHT GUIDE (Worldwide ed. 1993).

71. Kasper, *supra* note 67, at 100-01. This issue is taken up again below. *See infra* part III.E.

72. Kasper, *supra* note 67, at 97.

73. *See infra* part IV.E.

74. Kasper, *supra* note 67, at 97.

75. *See infra* part IV.C.2.

76. Secretariat of the International Civil Aviation Organization, *supra* note 34, attachment B, para. 16; *see also* BERNT & WEISS, *supra* note 2, at 105; JACKSON, WORLD TRADING, *supra* note 2, at 189-202; WEISMAN, *supra* note 21, at 77-78; Benz, *supra* note 11, at 114-15; Gold, *supra* note 6, at 303; Jackson, *Future Institutions*, *supra* note 2, at 27; Maffucci, *supra* note 11, at 396; Nayyar, *supra* note 23, at 39; Nicolaides, *supra* note 6, at 129; Randhawa, *supra* note 30, at 169-70; Rivers et al., *supra* note 6, at 246; Lee, *supra* note 46, at 120.

Article III of the GATT, "National Treatment on Internal Taxation and Regulation," presents this obligation:

1. The contracting parties recognize that internal taxes and other internal charges, and

obligation has had a salutary effect upon international trade and that it should be included in an international services trade regime.⁷⁷ The GNS consequently included a national treatment obligation in the GATS.⁷⁸ National treatment is thus perhaps best evaluated with reference to its track record as it has been implemented within the GATT and as it has been written into the GATS.

1. *Track Record of the National Treatment Obligation Under the GATT*

The national treatment obligation advances trade liberalization in several ways. First, national treatment entitles foreign firms to the same business opportunities and treatment as domestic firms, thereby establishing a basic standard of equality between foreign and domestic products sold within a country.⁷⁹ Thus, national treatment aims to ensure that trade concessions made to liberalize the flow of products into a country are not subsequently nullified by discriminatory internal measures, such as local content legislation and other non-tariff barriers (NTBs) as well as discriminatory taxes.⁸⁰

Second, national treatment allows governments to retain regulatory control over sectors regarded as being sensitive enough to warrant supervision,⁸¹ a description that fits a number of services industries.⁸² At the same time, however, national treatment may help to ensure that legitimate government policy concerns regarding such sensitive sectors do not spawn protectionist restrictions aimed at foreign service providers.⁸³

The GATT does not carry national treatment far enough.⁸⁴ As applied

laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

GATT, *supra* note 1, art. III. Article III spells out this general statement of principles in greater detail regarding internal taxes in § 2, other internal "laws, regulations and requirements" in § 4, and domestic content rules in § 5. However, § 8(a) specifically exempts government procurement policies while § 8(b) specifically exempts "the payment of subsidies exclusively to domestic producers."

77. WEISMAN, *supra* note 21, at 77-78, 99; Benz, *supra* note 11, at 115; Christmas, *supra* note 2, at 301; Gold, *supra* note 6, at 303; Maffucci, *supra* note 11, at 396; Nicolaides, *supra* note 6, at 129; Rivers et al., *supra* note 6, at 24; Dean Letter, *supra* note 63, at 2.

78. GATS, *supra* note 8, art. XVII; *see also*, BERNT & WEISS, *supra* note 2, at 105-08.

79. JACKSON, WORLD TRADING, *supra* note 2, at 189; Rivers et al., *supra* note 6, at 24; Lee, *supra* note 46, at 120.

80. JACKSON, WORLD TRADING, *supra* note 2, at 189; Rivers et al., *supra* note 6, at 24.

81. Benz, *supra* note 11, at 115; Maffucci, *supra* note 11, at 396; Lee, *supra* note 46, at 120-21.

82. *See supra* part II.C.

83. The national treatment obligation is particularly significant because "[t]he temptation of legislators and other government officials to shape regulatory or tax measures so as to favor domestic products seems to be very great, and proposals to do this are constantly suggested." JACKSON, WORLD TRADING, *supra* note 2, at 190; *see also* WEISMAN, *supra* note 21, at 78; Schott & Mazza, *supra* note 6, at 269.

84. Others have reached this conclusion as well:

[National treatment] is insufficient in present circumstances to promote liberalization of markets on a broad basis [T]he concept does not on its own give the opportunity in most countries for effective market access by service providers and therefore [must] be linked with the concept of effective market access and progressive liberalization of markets.

in GATT practice, national treatment does not create a right of establishment or mitigate immigration rules. Most important, it cannot effectively prevent de facto discrimination by highly technical, detailed, and idiosyncratic industry-specific regulatory schemes that, on their face, seem neutral.⁸⁵ Such NTBs, many of which explicitly target foreigners, particularly impede services trade and thus must be addressed by any services trade liberalization effort.⁸⁶ Regulations that treat a foreign and a domestic services provider almost exactly the same may unreasonably exclude foreign firms by subjecting them to conditions that they cannot hope to meet.⁸⁷ The GNS, in drafting the GATS, has attempted to address some of these difficulties.

OECD, *supra* note 33, at 29-30; *see also* Kasper, *supra* note 67, at 102 (supporting potential application of national treatment to aviation services trade); Landry Letter, *supra* note 63, at 2 (noting insufficient market access provisions, by comparison with existing sectoral agreements, in national treatment provisions in GNS proposals).

85. "Because of the differences between countries of various industry structures . . . strict but equal . . . [regulation] affects the foreign service firm to a much greater extent." Benz, *supra* note 11, at 115. *See generally* JACKSON, WORLD TRADING, *supra* note 2, at 192-99 (citing instances of trade disputes concerning de facto discrimination).

86. For a detailed discussion of NTBs that inhibit services trade, *see infra* part IV.C.3; *see also* Benz, *supra* note 11, at 115; Gibbs & Mashayekhi, *supra* note 32, at 85-86, 103; Rivers et al., *supra* note 6, at 25.

87. The Investment Company Act (Act), codified at 15 U.S.C. § 80a-1 et seq. (1993), provides an example of the exclusionary effect of complete national treatment of a foreign firm. Section 7(d) of the Act, with which a foreign investment company must comply in order to conduct a public offering in the United States, was intended to protect U.S. investors in foreign investment funds and effectively provides national treatment for foreign funds registering in the United States. *See* DIVISION OF INVESTMENT MANAGEMENT, SEC, PROTECTING INVESTORS: A HALF CENTURY OF INVESTMENT COMPANY REGULATION 189 (May 1992) [hereinafter DIVISION OF INVESTMENT MANAGEMENT]. National treatment in this context means that the foreign fund is not only treated like a U.S. fund, but that it is almost forced to become a U.S. fund.

In implementing § 7(d),

. . . the [Securities and Exchange] Commission adopted rule 7d-1, setting forth the conditions with which Canadian [and other foreign] applicants must comply to satisfy . . . section 7(d). Among other criteria, the rule requires that

- (1) the fund's charter and bylaws contain the substantive provisions of the [U.S.] Investment Company Act, and an interpretation of the charter or bylaws [that] conform with United States law;
- (2) each officer, director, adviser, custodian, and underwriter for the investment company enter into an agreement, filed with the Commission, that provides that each will comply with the Investment Company Act, and that the shareholders of the investment company may sue in the United States for any violation of the Investment Company Act;
- (3) at least a majority of the directors and officers be United States citizens, a majority of whom will be United States residents;
- (4) all of the investment company's assets be maintained in the United States with a United States bank;
- (5) the original or a duplicate copy of the investment company's books and records be kept in the United States;
- (6) the investment company's principal underwriter be a United States entity; and
- (7) the investment company use a United States auditor.

Id. at 192-93. As the Securities and Exchange Commission itself concedes, "[b]ecause the conditions dictate that a company relying on the rule be structured and operated in large part like a United States investment company, they are impractical for most foreign investment companies." *Id.* at 193; *see also* Loughlin Interview II, *supra* note 64 (in agreement regarding aviation services).

2. *The National Treatment Obligation as Written into the GATS*

The GATS recognizes in principle that, in order to gain market access, foreign service providers may need to receive treatment that is other than absolutely identical with that given to domestic service providers.⁸⁸ It does not, however, rigorously apply its general statement of principle to address the myriad, mundane details of specific national regulatory schemes. This provision may thus have little practical effect.⁸⁹

Any attempt to apply national treatment to services trade must address NTBs that inhibit services trade in particular.⁹⁰ Unfortunately, this proposition is not universally accepted, largely because these NTBs are politically sensitive.⁹¹ This divergence in political positions underscores the difficulty in applying obligations such as national treatment on as broadly multilateral a basis as is attempted within the GATT-based approach.⁹²

The GATS includes several obligations beyond a simple rule of national treatment to address NTBs that specifically impede services trade. First, the GATS mandates that member states provide market access to services suppliers.⁹³ It thus raises the issue of market access, which is distinct from equal treatment, and addresses several impediments to services trade. This mandate is, however, qualified by "the terms, limitations and conditions agreed and specified" by each member state in its national schedule, which may be so considerable as to nullify the effect of the general rule.⁹⁴ Further, this mandate does not by itself resolve the technical, idiosyncratic regulatory

88. See GATS, *supra* note 8, art. XVII(2).

89. See *infra* part IV.D.

90. Nayyar, *supra* note 23, at 39.

91. According to the First Secretary at the Permanent Mission of India to the U.N. Offices, [w]e have argued that such equivalent treatment of foreign enterprises [as would result from such an application of national treatment to services] amounts to a guarantee of equal opportunity to foreign nationals and foreign enterprises by the national government, which has no basis in any other field of economic endeavor. Does any government permit equality of opportunity to foreigners? It is obvious that what may be appropriate in the OECD context may not be appropriate in the multilateral context . . .

Randhawa, *supra* note 30, at 170; see also Nayyar, *supra* note 23, at 39; Schott & Mazza, *supra* note 6, at 269.

92. See *infra* part III.E.

93. GATS, *supra* note 8, art. XVI.

94. *Id.* art. XVI(1). For example, qualifications by the U.S. in the "Radio and Television Transmission Services" sector would appear to exclude any foreign radio or television broadcaster from the U.S. market:

Radio and television licenses may not be held by: a foreign government; a corporation chartered under the law of a foreign country or which has a non-U.S. citizen as an officer or director or more than 20 percent of the capital stock of which is owned or voted by non-U.S. citizens; a corporation chartered under the laws of the United States that is directly or indirectly controlled by a corporation more than 25 percent of whose capital stock is owned by non-U.S. citizens or a foreign government or a corporation of which any officer or more than 25 percent of the directors are non-U.S. citizens.

Communication from the United States of America: Revised Final Schedule of the United States of America Concerning Initial Commitments (draft) 17 (Dec. 15, 1993) (on file with author) [hereinafter U.S. Schedule].

regimes that impede services trade within each services industry.⁹⁵ The mandate also does not apply to services sectors for which a member state did not make a market access commitment in its national schedule.⁹⁶ Finally, the requirement that states grant market access commitments on a non-discriminatory basis would appear to raise the same concerns noted earlier regarding an unconditional MFN obligation.⁹⁷

Second, the GATS mandates impartial administration of domestic national regulations.⁹⁸ This development is also a positive one, but the GNS appears to have so hedged the language of this provision with qualifications⁹⁹ and subjected it to future negotiation¹⁰⁰ as to deprive it of much of its force and practical relevance. This mandate also does not apply to services sectors for which a member state did not make a market access commitment in its national schedule.¹⁰¹

Third, the GATS contains an exhortation to GATS members to recognize other national regulatory schemes as fulfilling their own regulatory requirements.¹⁰² The language, however, is permissive rather than mandatory.¹⁰³ In addition, this unconditional non-discrimination requirement¹⁰⁴ would appear to raise concerns similar to those noted earlier regarding an unconditional MFN obligation.¹⁰⁵

The national treatment obligations of the GATT-based approach may be improved to address NTBs that impede services trade. It is also possible to address the practical difficulties of applying national treatment on as broadly multilateral a basis as is attempted within the GATT-based approach.¹⁰⁶

D. *Dispute Resolution Mechanism*

The trade dispute resolution mechanism of the GATT represents an unprecedented degree of commitment by its members to resolve disputes

95. See *infra* part IV.D.

96. GATS, *supra* note 8, art. XVI(1).

97. See *supra* part III.B.

98. See GATS, *supra* note 8, art. VI.

99. For instance, member states are to ensure that domestic regulations "are administered in a reasonable, objective and impartial manner." *Id.* art. VI(1) (emphasis added). By themselves, these broad terms do little to provide guidance in specific cases. In U.S. jurisprudence, for instance, such terms derive meaning only over time as courts apply them in specific cases. Such terms will likely be susceptible to divergent interpretations among GATS members and to obstructionist interpretations by states that are averse to rapid services trade liberalization. This language will undermine the force of the Article. See *infra* part III.E.

100. GATS, *supra* note 8, art. VI(4).

101. *Id.* art. VI(1).

102. See *id.* art. VII.

103. *Id.* art. VII(1). Given the very permissive language of this section ("a Member may recognize . . ."), one is left to wonder what legal effect, if any, it has. Sovereign states, after all, surely have the power to recognize foreign regulatory schemes even in the absence of the "permission" granted by this paragraph.

104. *Id.* art. VII(3).

105. See *supra* part III.B.

106. See *infra* part IV.C.3.

among themselves by means of an orderly, prescribed series of steps. No other international agreement has been adopted by more sovereign states, or is applied to resolve as many disputes among them, as is the GATT.¹⁰⁷

The GATS contains a dispute resolution mechanism that draws heavily on that of the GATT, both in its language and in its substance.¹⁰⁸ Thus, the dispute resolution mechanism is perhaps best evaluated with reference to its operation within the GATT context.¹⁰⁹ The mechanism is usually invoked by a member state that believes that benefits due it under the GATT are being "nullified or impaired."¹¹⁰ The mechanism involves a series of roughly seven steps.¹¹¹ First, GATT member states may consult with one another on any issue and receive "sympathetic consideration" of their proposals.¹¹² If consultations fail to resolve an issue, the complaining member may seek recommendations from other members of the GATT, its Director-General, Council, or "any appropriate inter-governmental organization."¹¹³ The complaining member may then petition the GATT Council¹¹⁴ to appoint a panel consisting of individuals drawn from member states.¹¹⁵ This GATT panel investigates the issue presented to it and then recommends modification of the disputed measure, compensation, or retaliation.¹¹⁶ To become effective, the report and recommendations of the panel must be adopted by the GATT Council, which may require further negotiation and analysis.¹¹⁷ The member state criticized by the panel report voluntarily determines whether or not to abide by the nonbinding recommendations of the panel.¹¹⁸ Finally, the

107. The GATT dispute resolution mechanism deals "with far more countries and far more cases than, for example, the World Court or any other broadly based international tribunal." Jackson, *Future Institutions*, *supra* note 2, at 18; *see also* JACKSON, *WORLD TRADING*, *supra* note 2, at 91-92; Benz, *supra* note 11, at 115.

108. *See* GATS, *supra* note 8, arts. XXII, XXIII.

109. Many of the criticisms raised here are not unique to the services context, but of course apply as well to the resolution of disputes involving trade in goods.

110. GATT, *supra* note 1, art. XXIII(1); *see also* JACKSON, *WORLD TRADING*, *supra* note 2, at 94; Benz, *supra* note 11, at 115; Davey, *supra* note 2, at 55; Klaiman, *supra* note 2, at 660.

111. These steps are primarily contained in Articles XXII (Consultation) and XXIII (Nullification or Impairment) of the GATT. In addition, a written understanding in 1979 codified the "informal dispute settlement procedures" that had developed through practice over three decades. Klaiman, *supra* note 2, at 661. A ministerial declaration in 1982 reaffirmed this understanding. Davey, *supra* note 2, at 58; *see also* JACKSON, *WORLD TRADING*, *supra* note 2, at 94-97; MONOPOLKOMMISSION, *supra* note 2, para. 1140; Davey, *supra* note 2, at 54-55; Maffucci, *supra* note 11, at 405-08.

112. GATT, *supra* note 1, arts. XXII, XXIII; *see also* Davey, *supra* note 2, at 58; Klaiman, *supra* note 2, at 661. Indeed, Article XXII proceedings offer nothing outside of consultations. MONOPOLKOMMISSION, *supra* note 2, para. 1140.

113. GATT, *supra* note 1, art. XXIII(2); *see also* Davey, *supra* note 2, at 58; Klaiman, *supra* note 2, at 662.

114. The GATT Council "meets more or less monthly and is open to all contracting parties willing to participate. It has been delegated all of the powers of the contracting parties, except the power to grant waivers. Its decisions may be appealed to the contracting parties, acting as a group." Davey, *supra* note 2, at 55 n.10.

115. MONOPOLKOMMISSION, *supra* note 2, para. 1140; *see also* JACKSON, *WORLD TRADING*, *supra* note 2, at 96; Davey, *supra* note 2, at 58-59; Klaiman, *supra* note 2, at 662-63.

116. Davey, *supra* note 2, at 59-60.

117. *Id.* at 60; Klaiman, *supra* note 2, at 663.

118. MONOPOLKOMMISSION, *supra* note 2, para. 1140; Klaiman, *supra* note 2, at 663.

complainant may petition for permission "to suspend the application to any other contracting party [to the GATT] of such obligations or concessions under [the GATT] as they determine to be appropriate in the circumstances."¹¹⁹ Retaliation, however, has been authorized only once in the history of the GATT.¹²⁰

Despite its advantages, the GATT dispute resolution mechanism is beset by significant difficulties, both generally and in its specific application to trade in services. Such difficulties involve procedural issues such as delays, obstruction by affected member states, the absence of an effective enforcement mechanism, and uncertainty over the goals of the dispute resolution mechanism. In addition, the GATT dispute resolution mechanism is applied so infrequently as to raise questions about its relevance to most trade disputes.

1. *Procedural Issues*

The GATT dispute resolution mechanism may appear interminably slow from the perspective of parties contesting disputed practices. Aside from the domestic and international negotiations and consultations that precede appointment of a panel, however, GATT dispute resolution proceedings have recently been concluded on average in under two years.¹²¹ GATT proceedings have dragged on for up to eight years,¹²² but that is not the norm. The length of GATT proceedings thus appears to compare favorably with the speed of domestic litigation in many countries.¹²³ Even though these statistics are encouraging, they are somewhat misleading in that they exclude significant sources of delay.

First, the GATT, an international agreement governed by rules of public international law, does not incorporate a direct private right of action for individuals.¹²⁴ Instead, private complainants must first successfully lobby their own governments to champion a complaint through diplomatic channels, a step not present in domestic litigation.¹²⁵ Whether relevant government

119. GATT, *supra* note 1, art. XXIII(2); *see also* MONOPOLKOMMISSION, *supra* note 2, para. 1140; Davey, *supra* note 2, at 60; Klaiman, *supra* note 2, at 663.

120. JACKSON, WORLD TRADING, *supra* note 2, at 96; KEOHANE, *supra* note 2, at 104-05; Davey, *supra* note 2, at 60; Klaiman, *supra* note 2, at 663.

121. Davey, *supra* note 2, at 84-85 (noting improvement in speed of proceedings); *see also* MONOPOLKOMMISSION, *supra* note 2, para. 1141 (same).

122. This was true in the now infamous *DISC* case. Davey, *supra* note 2, at 84; Klaiman, *supra* note 2, at 666.

123. *Id.*

124. JACKSON, WORLD TRADING, *supra* note 2, at 103-04; MONOPOLKOMMISSION, *supra* note 2, para. 1144; Brand, *supra* note 2, at 126-34.

125. In the United States, complainants may lobby or may file petitions under Section 301 of the Trade Act of 1974. The "New Commercial Policy Instrument" of the European Union has a similar aim. *See generally* JACKSON, WORLD TRADING, *supra* note 2, at 103-09; KAPTEYN & VAN THEMAAT, *supra* note 15, at 817-20; MONOPOLKOMMISSION, *supra* note 2, para. 1151; Brand, *supra* note 2, at 126-27.

Individuals do also have the option of pursuing anti-dumping, countervailing duty and other causes of action under national laws. *See, e.g.,* JACKSON, WORLD TRADING, *supra* note 2, at 103-09, 217-73; KAPTEYN & VAN THEMAAT, *supra* note 15, at 807-20; Brand, *supra* note 2, at 115-16, 126-28. However,

departments currently have the resources to advocate the interests of their nationals in the hundreds of trade disputes that occur every year is questionable.¹²⁶

Second, a complaining member state does not have the absolute right to initiate the formal dispute resolution mechanism by obtaining appointment of a panel.¹²⁷ Instead, it must first consult with the opposing state(s). The complainant must then pursue additional diplomacy to secure sufficient votes in the GATT Council to obtain the appointment of a panel. As the opposing state(s) argue against appointment of a panel, delay is the inevitable result.

Once the GATT Council has decided to appoint a panel, further delay results as the parties negotiate its composition.¹²⁸ None of this delay is taken into account in calculating the recent two-year average duration of GATT proceedings. The delay is attributable to the emphasis upon diplomacy and consensus in GATT proceedings.¹²⁹ This is true especially because a party allegedly infringing GATT rules must be part of the consensus-based resolution of a dispute.

Third, the GATT Council must adopt a completed panel report. A losing state "may hold up adoption of a panel report interminably while it purports to analyze it and to explore possible negotiated solutions with the prevailing party."¹³⁰ Given the average two-year duration of GATT proceedings, this is not a major source of delay, although it has been the source of the most serious of recent delays.¹³¹

Fourth, the GATT lacks an effective enforcement mechanism. By one calculation, perhaps 7-8% of panel reports have not been followed.¹³² The GATT Secretariat found that fewer than 4% of panel reports led to noncompliance.¹³³ These statistics do not, however, consider situations in which a complainant failed to have a panel convened or in which a panel failed to reach a result.

Perhaps the fundamental issue behind procedural difficulties with the dispute resolution mechanism is the international ideological dispute over its

these domestic, private causes of action do not afford the private plaintiff a direct attack on disputed foreign government policies.

126. Reports of the apparently modest financial resources of the Office of the U.S. Trade Representative suggest that it could not now annually prosecute hundreds of trade cases on behalf of individual complainants. See Keith Bradsher, *U.S. Trade Office Skimps: Its \$20 Million Budget Is Called Small*, INT'L HERALD TRIB., Nov. 2, 1993, at 11.

127. JACKSON, WORLD TRADING, *supra* note 2, at 98; Davey, *supra* note 2, at 58, 91.

128. Davey, *supra* note 2, at 58-59; Klaiman, *supra* note 2, at 664-65.

129. For a detailed discussion of opportunities for obstruction in the decisionmaking processes within the GATT dispute resolution mechanism, see Davey, *supra* note 2, at 90-98; see also JACKSON, WORLD TRADING, *supra* note 2, at 97; Klaiman, *supra* note 2, at 665-66.

130. Davey, *supra* note 2, at 60; Klaiman, *supra* note 2, at 665.

131. Davey, *supra* note 2, at 85.

132. JACKSON, WORLD TRADING, *supra* note 2, at 101. By another observation, almost all GATT panel reports issued since the beginning of the 1980s have been accepted by the disputants. MONOPOLKOMMISSION, *supra* note 2, para. 1141.

133. Davey, *supra* note 2, at 86.

purpose. Should the system seek primarily to achieve international consensus that includes even the "offending" state(s), as it presently does? Or, should it follow an adjudicatory model, similar to that applied by Western courts to resolve commercial disputes?¹³⁴

2. *Infrequent Application of the Dispute Resolution Mechanism*

At first blush, the GATT dispute resolution mechanism would appear to play an active role in resolving trade disputes among nations. Approximately 233 cases have been brought under the GATT dispute resolution mechanism in the forty years between its inception and 1988.¹³⁵ One commentator notes that the mechanism has had a "burgeoning of business" since 1979, when it saw "from five to seven disputes processed in the system per year."¹³⁶ At this rate, the GATT mechanism would have addressed about 100 international trade disputes in the fifteen years since 1979.

Unfortunately, and despite the optimism of some observers, the relative infrequency of application of the GATT dispute resolution mechanism becomes readily apparent upon comparison with the volume of trade cases handled by other jurisdictions. While other trade regulatory schemes and the GATT do not necessarily apply concurrently to all the same types of disputes, there are both significant areas of potential jurisdictional overlap and significant disparities in the volumes of disputes reviewed.

U.S. courts and administrative agencies, for instance, have reviewed over 300 countervailing duty cases¹³⁷ and over 420 allegations of dumping since 1979,¹³⁸ and more than 70 Section 301 petitions between 1974 and 1989.¹³⁹ These disputes could potentially have been reviewed by the GATT dispute resolution mechanism applying legal norms of the GATT.¹⁴⁰ Instead, these disputes were reviewed by U.S. institutions applying domestic U.S. law.

134. This controversy is not addressed here, because its mere existence as a force weakening the GATT mechanism is more relevant than are the substantive issues involved. For a detailed review of this debate, see, e.g., JACKSON, *WORLD TRADING*, *supra* note 2, at 91-94; Brand, *supra* note 2, at 123-25; Davey, *supra* note 2, at 65-81; Jackson, *Future Institutions*, *supra* note 2, at 19-21.

135. JACKSON, *WORLD TRADING*, *supra* note 2, at 98.

136. Davey, *supra* note 2, at 81. The "increasing importance" of the GATT dispute settlement system is also noted by the German government Monopolkommission. MONOPOLKOMMISSION, *supra* note 2, para. 1141 (translation by the author).

137. JACKSON, *WORLD TRADING*, *supra* note 2, at 251. Another tabulation of U.S. countervailing duty disputes lists about 220, of which about 10 were initiated prior to 1979. PATTISON, *supra* note 2, app. B.

138. JACKSON, *WORLD TRADING*, *supra* note 2, at 228. Another tabulation of U.S. dumping disputes lists about 475 actions, of which about 30 were initiated before 1979. PATTISON, *supra* note 2, app. A.

139. JACKSON, *WORLD TRADING*, *supra* note 2, at 106.

140. GATT, *supra* note 1, arts. VI (anti-dumping and countervailing duties), XVI (subsidies); Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, Apr. 12, 1979, 31 U.S.T. 513, 1186 U.N.T.S. 204 (generally known as the GATT Subsidies Code); Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 12, 1979, 31 U.S.T. 4919 (generally known as the GATT Anti-Dumping Code). See generally JACKSON, *WORLD TRADING*, *supra* note 2, at 225-28, 249-73; PATTISON, *supra* note 2.

The GATT presents many more types of legal norms, alleged violations of which at least potentially could be reviewable under the GATT dispute resolution mechanism, than those at issue in the three types of trade disputes for which U.S. statistics are available. Even counting only these three dispute types, U.S. courts and administrative processes handled at least eight times as many trade disputes as were actually handled by the GATT mechanism in the fifteen years since 1979 (or since 1974, in the case of Section 301 petitions). These disputes could potentially have been handled by the GATT mechanism. The comparatively infrequent application of the GATT mechanism to disputes involving the United States correspondingly diminishes the relevance of GATT legal norms, as opposed to domestic U.S. law, to trade involving the United States.

The U.S. legal system is certainly not the only jurisdiction that reviews trade disputes that could also be addressed in the GATT framework. Others of the ninety-six or so states¹⁴¹ that currently make up the GATT membership maintain similar trade laws.¹⁴² Multilateral international agreements other than the GATT also provide for multinational trade dispute resolution mechanisms.¹⁴³ Thus, each year, thousands of international trade disputes are resolved outside the GATT dispute resolution mechanism. The GATT mechanism and, by extension, the international legal norm of the GATT are consequently of little relevance to the vast majority of trade disputes.

To be effective and relevant, any framework attempting to liberalize services trade will require a dispute resolution mechanism that works and is

141. JACKSON, *WORLD TRADING*, *supra* note 2, at 48. The GATT applies to about 115 states if one includes non-party states that voluntarily apply GATT rules to their trade relations. MONOPOLKOMMISSION, *supra* note 2, para. 1140; PATTISON, *supra* note 2, § 1.05[1], at 1-18 n.1; Brand, *supra* note 2, at 121; Klaiman, *supra* note 2, at 658.

142. For instance, the European Union and its member states severally, Japan, New Zealand, South Africa, Australia, and Canada have domestic legislation at least partly overlapping GATT rules. See JACKSON, *WORLD TRADING*, *supra* note 2, at 228; MONOPOLKOMMISSION, *supra* note 2, paras. 1151-54; John H. Jackson & William J. Davey, *Reform of the Administrative Procedures Used in U.S. Antidumping and Countervailing Duty Cases 21-27* (Nov. 1991) (report available from the Administrative Conference of the United States, Washington, D.C.).

143. For instance, the Canada-United States Free Trade Agreement provides for binational adjudicatory panels. Canada-United States Free Trade Agreement, Jan. 2, 1988, ch.19, 27 I.L.M. 281 (1988). For decisions rendered by U.S.-Canada binational panels, see NORTH AMERICAN FREE TRADE AGREEMENTS: UNITED STATES-CANADA FREE TRADE AGREEMENT: BINATIONAL PANEL REVIEWS AND REPORTS (James R. Holbein & Donald J. Musch eds., 1993).

Professor Davey notes that "the formation and expansion of the [EC] . . . diverted the attention of most of the European countries, which had previously been active in the [GATT] dispute settlement system. With the advent of the EC, disputes between EC members were settled within EC institutions." Davey, *supra* note 2, at 63. The Commission of the European Communities and the European Court of Justice have rendered thousands of decisions regarding economic and trade disputes among the member states of the European Communities. See generally, KAPTEYN & VAN THEMAAT, *supra* note 15. One tabulation lists about 145 anti-dumping and subsidy actions brought by the European Community against non-members between 1985 and 1991; however, this represents a minute fraction of trade disputes addressed by EC institutions. PATTISON, *supra* note 2, app. N. In the ten years following 1979, EC institutions averaged about five anti-dumping proceedings per year. PATTISON, *supra* note 2, § 16.01, at 16-4.

utilized.¹⁴⁴ Weaknesses with the mechanism in place under the GATT present one motive of major U.S. services industries to lobby vehemently not only against the mechanism, but the GATT-GNS framework as well.¹⁴⁵

3. *The GATS Dispute Resolution Mechanism*

The GATS includes a dispute resolution mechanism. However, it draws heavily from that of the GATT and raises some of the same concerns. First, aside from the provision for the resolution of disputes in double taxation treaties,¹⁴⁶ the approach is consensus-oriented, aimed at producing solutions "mutually satisfactory" both to the complainant and alleged offender.¹⁴⁷ Second, while the GATS mechanism includes provisions for retaliatory measures to enforce compliance,¹⁴⁸ one must bear in mind that such measures under a similar provision in the GATT were implemented only once in forty years.¹⁴⁹ It remains to be seen whether the GATS enforcement mechanism will prove to be more effective. Third, until the GATS specifically addresses the multitude of industry-specific national regulatory schemes that impede services trade, national legal norms will continue to be more relevant to services trade than GATS norms.¹⁵⁰ Finally, access to the GATS mechanism is granted only to member states and not to services producers themselves.¹⁵¹ Members of the GATT appear to have committed recently to increasing the effectiveness of GATT-based dispute resolution.¹⁵² Thus, the GATS mechanism may prove to be more effective than the track record of the GATT mechanism would suggest.

In summary, the GATT-based approach to dispute resolution is inadequate for two reasons. First, the delay, orientation towards international consensus, and opportunities for obstruction present in the GATT mechanism impair its

144. This has been argued elsewhere as well. MONOPOLKOMMISSION, *supra* note 2, paras. 1140, 1144, 1146; Berg, *supra* note 6, at 12; Gibbs & Mashayekhi, *supra* note 32, para. 12; Maffucci, *supra* note 11, at 405-08; Nicolaides, *supra* note 6, at 133; Rivers et al., *supra* note 6, at 25.

145. Comlish Letter, *supra* note 63, at 1-2 (commercial aviation); Simpkins Letter, *supra* note 63 (maritime, trucking and commercial aviation industries); Dean Letter, *supra* note 63, at 2 (commercial aviation); Loughlin Interview II, *supra* note 64 (commercial aviation).

146. GATS, *supra* note 8, art. XXII(3).

147. *Id.* art. XXII(1),(3); see *supra* text accompanying note 134 (noting difficulties with consensus-oriented approach to dispute resolution under GATT). One observer optimistically notes that the World Trade Organization (WTO) "will operate, as Gatt [*sic*] now does, on the basis of consensus. The main exception is dispute settlement where offending countries will no longer be able to block adoption of panel reports." Frances Williams, *WTO — A New Name Heralds New Powers*, FIN. TIMES, Dec. 16, 1993, at 5.

148. GATS, *supra* note 8, art. XXIII(2).

149. See *supra* text accompanying note 120.

150. See *supra* part III.D.2.

151. See *supra* text accompanying note 124 (noting concerns raised by absence of direct private right of action by individual services producers).

152. See Williams, *supra* note 147, at 5; see also Frances Williams, *Confusion over Section 301 Powers on Services*, FIN. TIMES, Dec. 17, 1993, at 4 (discussing impressions of EU and U.S. officials that more disputes, including those regarding services, will now be subject to multilateral dispute resolution to exclusion of unilateral national measures).

effectiveness in resolving trade disputes. Second, the GATT mechanism addresses too few of the myriad mundane disputes that arise in goods trade and that could reasonably be expected to arise in services trade to accord GATT legal norms supremacy over domestic regulation or general relevance to trade disputes. Since the GATS mechanism draws heavily from that of the GATT, the GATS would appear to raise similar concerns.¹⁵³

E. Multilateralism

The foregoing discussions of MFN, national treatment obligations, and dispute resolution have noted the difficulties in applying these principles in as broadly multilateral a manner as that attempted in the GATT. The GATT, with ninety-six member countries,¹⁵⁴ is one of the most broadly multilateral international agreements in existence. It provides a single multilateral framework to negotiate reductions in trade barriers and thereby eliminates the need to negotiate many bilateral agreements.¹⁵⁵ The GATT thus serves as a valuable forum for the discussion and resolution of international trade issues that is open to almost all the nations of the world. This is surely beneficial, and I do not argue here that the GATT or GNS should be abolished. Nonetheless, the all-inclusive multilateralism of the GATT-based approach is one of its central weaknesses.

1. Fundamental Disagreement over Progress in Services Trade

Ideological schisms in the world trading community — particularly between LDCs and developed countries (DCs) — cripple the capacity of institutions as broadly multilateral as the GATT to pursue multilateral negotiations aimed at liberalizing international services trade. For years, the United States and other DCs have sought to introduce services trade liberalization talks into the GATT framework.¹⁵⁶ The Carter administration

153. See *infra* part IV.B.

154. See *supra* note 141.

155. For instance,

[t]he global approach would have the advantage of avoiding repetitive, time consuming and costly negotiations of substantially the same issues in each industry while, at the same time, providing for the idiosyncratic needs of very diverse industries. Furthermore, this approach "results in a more organized, less complicated, body of legislation than does the individual industry or selective approach."

Maffucci, *supra* note 11, at 402-03 (footnote omitted); see also Brand, *supra* note 2, at 121-22; Gold, *supra* note 6, at 290 ("The alternative of negotiating an independent multilateral trade agreement, with its own organizational supporting structure for administration and dispute resolution wholly outside the GATT, is unrealistic."); Kasper, *supra* note 67, at 99-100 (noting that some argue "that an umbrella agreement is likely to result in an efficient use of negotiating resources, for it would develop a single set of rules and procedures for identifying and reducing barriers to expanded trade in all service industries"); Schott & Mazza, *supra* note 6, at 267.

156. Berg, *supra* note 6, at 2-3; Schott & Mazza, *supra* note 6, at 254. Services trade issues (transport insurance) were already broached under GATT auspices in the 1950s. Berg, *supra* note 6, at 2. The Kennedy Round of GATT negotiations in the mid-1960s brought the "first attempt" to attack NTBs,

attempted, with little success, to introduce services trade issues at the 1973-79 Tokyo Round.¹⁵⁷ At a GATT ministerial meeting in November 1982, the United States introduced services trade liberalization as a priority issue and encountered responses "varying from 'cautious' or 'cool' to downright hostile[e]."¹⁵⁸ In 1984, the United States managed, in "gruelling all-night negotiations," to extract an agreement from the other GATT parties to *study* services trade issues.¹⁵⁹ Finally, in September 1986, services trade issues were officially included in the agenda adopted for the Uruguay Round, but only after the United States threatened that it would otherwise not participate in the Round.¹⁶⁰

Some LDCs, most notably India and Brazil, have vehemently opposed efforts to include services trade issues within GATT discussions.¹⁶¹ Their opposition stems in part from a belief that the benefits of services trade liberalization would accrue to DCs — that services trade flows primarily from DCs to LDCs by virtue of the economic power and comparative advantage of DCs¹⁶² and that liberalization would exacerbate balance of payments problems for LDCs.¹⁶³ LDCs use the "infant industry" argument to justify protecting their service producers from having to compete against the capital investments, knowledge base, and scale economies of DC services producers.¹⁶⁴ Given the perceived significance of services sectors to national security and development, LDC governments seek to avoid dependence on large, foreign corporations in this area.¹⁶⁵ Beyond these concerns, LDCs

which present perhaps the primary barrier to services trade. Jackson, *Recent Problems*, *supra* note 2, at 10.

157. Rivers et al., *supra* note 6, at 16-18. While not on the agenda for negotiation, services were cursorily mentioned in the GATT Government Procurement Code resulting from the Tokyo Round. *Id.*; see also Maffucci, *supra* note 11, at 390; Schott & Mazza, *supra* note 6, at 265.

158. Ewing, *supra* note 11, at 147; see also Gibbs & Mashayekhi, *supra* note 32, at 82-83; Gold, *supra* note 6, at 285; Maffucci, *supra* note 11, at 371; Rivers et al., *supra* note 6, at 21.

159. Gibbs, *supra* note 18, at 203; see also Gibbs & Mashayekhi, *supra* note 32, para. 6.

160. Berg, *supra* note 6, at 1, 13; Jackson, *Future Institutions*, *supra* note 2, at 21; Jackson, *Recent Problems*, *supra* note 2, at 2; Klaiman, *supra* note 2, at 658; McCulloch, *supra* note 21, at 333; Nayyar, *supra* note 23, at 35; Randhawa, *supra* note 30, at 163-67; Rivers et al., *supra* note 6, at 19.

161. BERNT & WEISS, *supra* note 2, at 106-07 (noting that DCs and LDCs disagree over telecommunications services liberalization); SPERO, *supra* note 2, at 123-24; Berg, *supra* note 6, at 3-4, 17-18; Gibbs & Mashayekhi, *supra* note 32, at 90-91; Jackson, *Recent Problems*, *supra* note 2, at 3; McCulloch, *supra* note 21, at 332-33; Nayyar, *supra* note 23, at 35; Randhawa, *supra* note 30, at 166; Rivers et al., *supra* note 6, at 19; Schott & Mazza, *supra* note 6, at 254.

162. One LDC observer writes of "the virtual hegemony of Transnational Corporations in services," which he asserts is "fairly well documented." Randhawa, *supra* note 30, at 169; see also Berg, *supra* note 6, at 19; Jackson, *Recent Problems*, *supra* note 2, at 3; Schott & Mazza, *supra* note 6, at 259-60.

163. Gibbs & Mashayekhi, *supra* note 32, at 97; Nayyar, *supra* note 23, at 43, 46.

164. Berg, *supra* note 6, at 18; Ewing, *supra* note 11, at 157; Nayyar, *supra* note 23, at 45; Rivers et al., *supra* note 6, at 19; Schott & Mazza, *supra* note 6, at 261.

165. Nayyar, *supra* note 23, 46-47 ("Sectors such as banking, insurance, shipping, transport and telecommunications constitute the core of the infrastructure that is strategic in the process of development. Most developing countries wish to retain control over their banking and insurance sectors which mobilize resources to finance the process of development; the allocation of these scarce resources and the effectiveness of financial policies are both, in a sense, a function of such control."); Berg, *supra* note 6, at 18 ("The governments of . . . [LDCs] often own and operate such service industries as banking, insurance, shipping, and telecommunications. Authorities use these industries as instruments of national

view obstruction of services trade liberalization as a negotiating tool. LDCs wish to achieve further liberalization of goods trade under the GATT to achieve access to DC markets for farming, textile, raw material, and other LDC exports; because services trade liberalization is primarily of interest to DCs, LDCs obstruct progress on services trade in order to pressure DCs to advance goods trade liberalization and open DC markets to LDC exports.¹⁶⁶

That twenty years of negotiations had achieved only agreement to begin discussion of services trade issues suggests that LDC obstruction has not been without success. Twenty years of negotiations resulted in a diplomatic and rhetorical compromise to create the Group on Negotiations on Services (GNS).¹⁶⁷ While the GNS talks preserve the appearance of multilateral GATT trade negotiations, they are technically conducted outside the GATT framework.¹⁶⁸ The vehemence of disagreement over services trade and the decades required to initiate negotiations do not bode well for the successful or expeditious completion of planned future rounds of GNS negotiations.¹⁶⁹

economic and social policy.”); *see also supra* part II.C; BERNT & WEISS, *supra* note 2, at 109; Ewing, *supra* note 11, at 156; Rivers et al., *supra* note 6, at 19; Schott & Mazza, *supra* note 6, at 263-64.

166. Gibbs & Mashayekhi, *supra* note 32, at 90; Rivers et al., *supra* note 6, at 19; Schott & Mazza, *supra* note 6, at 267.

167. WEISMAN, *supra* note 21, at 55-56, 160-67; Gibbs, *supra* note 18, at 199-203; Gibbs & Mashayekhi, *supra* note 32, at 81; Jackson, *Recent Problems*, *supra* note 2, at 3-4; Nayyar, *supra* note 23, at 35-36; Nicolaides, *supra* note 6, at 125; Randhawa, *supra* note 30, at 163-65; Rivers et al., *supra* note 6, at 19.

According to the Ministerial Declaration adopted at Punta del Este launching the Uruguay Round,

Ministers also decide[d], as part of the Multilateral Trade [GATT] Negotiations, to launch negotiations on trade in services.

Negotiations in this area shall aim to establish a multilateral framework of principles and rules for trade in services, including elaboration of possible disciplines for individual sectors, with a view to expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting economic growth of all trading partners and the development of developing countries. Such framework shall respect the policy objectives of national laws and regulations applying to services and shall take into account the work of relevant international organizations.

GATT procedures and practices shall apply to these negotiations. A Group on Negotiations on Services is established to deal with these matters. Participation in the negotiations under this Part of the Declaration will be open to the same countries as under Part I. GATT secretariat support will be provided, with technical support from other organizations as decided by the Group of Negotiations on Services.

The Group of Negotiations on Services shall report to the Trade Negotiations Committee.

Ministerial Declaration on the Uruguay Round (Sept. 20, 1986), in *GENERAL AGREEMENTS ON TARIFFS IN TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS* 19, 28 (33d Supp. 1987).

168. According to an Indian government official,

[T]he Negotiations on Services are conducted as a distinct process outside the framework of GATT. This is reflected in the fact that the . . . [GNS] has been established by Ministers . . . [in their capacity as Ministers and not as representatives of parties to the GATT] and reports to the Trade Negotiations Committee . . . , which defers to the Ministers, and stands outside and above the GATT framework for the Group of Negotiations on Goods. Hence, while it is correct to say that negotiations on Services are taking place in the Uruguay Round it is incorrect to refer to them as GATT negotiations on Services.

Randhawa, *supra* note 30, at 164; *see also* Gibbs & Mashayekhi, *supra* note 32, at 83; Nayyar, *supra* note 23, at 35-36; Rivers et al., *supra* note 6, at 19.

169. *See* Randhawa, *supra* note 30, at 164-65; *see also* Nayyar, *supra* note 23, at 36 (“[T]he negotiations on trade in services are likely to be difficult, just as progress is bound to be slow.”); Schott & Mazza, *supra* note 6, at 271 (“U.S. policymakers understand that services negotiations will have a long

Some LDC views of the likely future course of GNS negotiations suggest a very slow process indeed.¹⁷⁰

Worse, services negotiations are marked by disagreement even among developed states. Among members of the Organization for Economic Cooperation and Development (OECD), for example,¹⁷¹ the EU only recently came to support U.S. efforts regarding services trade. Moreover, disagreements between the EU and United States have continued to be potential deal-breakers.¹⁷² Hope is scant for real progress regarding services trade in a forum as all-inclusively multilateral as the GATT when even a group of nations as similar as the OECD membership cannot reach agreement on this issue without extreme difficulty.

Issues other than services trade also produce deep divisions and concomitant protracted negotiations yielding few tangible results. Insufficient progress on agricultural trade has been a source of frustration for at least thirty years. The United States and other states that tried and failed to introduce agricultural goods into the GATT system both in the Kennedy Round (1962-65) and in the Tokyo Round (1973-79) had "made it a high priority matter" to pursue agricultural issues in the current Uruguay Round.¹⁷³ Agricultural trade issues are contentious even among groups of nations as similar as the United States and the EU.¹⁷⁴

In short, the world trading community has been riven by multiple,

time-fuse.").

170. According to an Indian official, the GNS should begin its deliberations with a general debate on how each participant sees the process of negotiations on Services [In addition,] definition and statistical issues related to trade in Services would have to be addressed in the initial phase of work in the GNS Developing countries such as Brazil and India have argued that considering so little is known about this complex subject, we should begin with a factual examination of the specific sectors which any eventual package for negotiations is likely to cover.

Randhawa, *supra* note 30, at 166. Prior to any discussion of rules or principles relevant to services trade, this LDC view envisions debate over industries to be covered by services trade liberalization and an examination of existing international disciplines and arrangements. *Id.* at 166-67. In light of the political schism between DCs and LDCs regarding services trade liberalization, proposals for such a thorough, piecemeal program of definition and study suggests that *decades* of further negotiation would precede any services trade agreement.

171. The OECD has been pursuing services trade liberalization at least since 1960, but without achieving more than "political statements of intent" that "are not legally binding." Benz, *supra* note 11, at 113; *see also* Ewing, *supra* note 11, at 154 ("[OECD] Members seem to be unenthusiastic. The codes [written regarding services] . . . are weak. OECD is a consultative rather than a negotiating body."); Maffucci, *supra* note 11, at 391-93.

172. Dodwell, *supra* note 8, at 4; Dodwell & Barber, *supra* note 8, at 1; David Dodwell & David Gardner, *US and EU Under Attack Over Gatt Delays*, FIN. TIMES, Dec. 13, 1993, at 1; David Dodwell & Frances Williams, *EU and US Clear Final Hurdles to World Trade Deal*, FIN. TIMES, Dec. 15, 1993, at 1; David Gardner & David Dodwell, *Gatt Deal May Hinge on US Demands in Audio-Visual Sector*, FIN. TIMES, Dec. 14, 1993, at 1; Gibbs & Mashayekhi, *supra* note 32, at 89; Jackson, *Recent Problems*, *supra* note 2, at 3; McCulloch, *supra* note 21, at 333; Rivers et al., *supra* note 6, at 20-21.

173. Jackson, *Future Institutions*, *supra* note 2, at 11-12; *see also* JACKSON, *WORLD TRADING*, *supra* note 2, at 2 ("The subject of agriculture has been very, very difficult for GATT throughout its history. The disciplines of GATT legally do apply to agricultural goods but in practice they have tended not to apply. The whole area of agriculture trade in the world has . . . largely escaped the discipline of GATT.").

174. SPERO, *supra* note 2, at 104-05; Jackson, *Future Institutions*, *supra* note 2, at 12.

vehement disputes, each of which has endured without proper resolution for at least two decades. The all-encompassing multilateral character of the GATT, as the following section argues, makes it no longer capable of resolving such disputes because postwar political developments have altered the political landscape out of which it arose.

2. *GATT as the Product of Unique Circumstances*

The GATT was the product of the unique political and economic circumstances that existed after the Second World War. The United States and its Allies had vanquished Japan and Nazi Germany and had overcome the Great Depression. Consequently, the Allies enjoyed a position of world dominance and leadership that allowed them to propose an ambitious, idealistic plan to recast the international political landscape to avoid further economic instability and war.¹⁷⁵ The GATT was one element of this plan.

However, the initial goodwill and postwar momentum dissipated and the moment slipped away.¹⁷⁶ The wartime alliance between the West and the Soviet Union deteriorated rapidly into the Cold War, which became the dominant international preoccupation of the DCs for nearly fifty years. In addition, the formation of the European Community (now known as the European Union) shifted the focus of trade liberalization discussions of a powerful bloc of states away from the GATT. Under these circumstances, the international consensus and goodwill that drove the GATT in the immediate postwar period could not but dissipate rapidly. Thus, in the international trade and economic arena, the consensus and momentum that produced the United Nations and IMF were insufficient to create the third institution in the series, the ITO, which was to administer international trade relations.¹⁷⁷ Perhaps the most powerful testimony to the dissipation in international momentum is the fact that the ITO foundered in the U.S. Congress, even though the United States had been its chief proponent and the international leader in building the postwar international economic order.¹⁷⁸

Today, the long postwar period of economic expansion has been replaced by lower growth rates and economic stagnation, which leave governments with still less political leeway for exhibiting magnanimity in international trade

175. See *supra* text accompanying note 1.

176. See, e.g., Brand, *supra* note 2, at 117-19; Jackson, *Recent Problems*, *supra* note 2, at 5-6. For relevant discussions of post-World War II international developments, see, for instance, A.W. DE PORTE, *EUROPE BETWEEN THE SUPERPOWERS: THE ENDURING BALANCE* (1979); ALFRED GROSSER, *THE WESTERN ALLIANCE: EUROPEAN-AMERICAN RELATIONS SINCE 1945* (1980); GEORGE F. KENNAN, *MEMOIRS: 1925-1950* (1967); KEOHANE, *supra* note 2, at 135-81; *THE ORIGINS OF THE COLD WAR AND CONTEMPORARY EUROPE* (C.S. Maier ed., 1978); SPERO, *supra* note 2, at 1-130; Pollard & Wells, *supra* note 2.

177. See *supra* text accompanying note 1.

178. DE PORTE, *supra* note 176, at 131; JACKSON, *WORLD TRADING*, *supra* note 2, at 34; KEOHANE, *supra* note 2, at 143-44; MONOPOLKOMMISSION, *supra* note 2, para. 1138; SPERO, *supra* note 2, at 94-95; Jackson, *Future Institutions*, *supra* note 2, at 16-17.

relations and diverting attention from parochial national interests.¹⁷⁹ The energy currently expended by the international community in negotiating regional and sectoral trade agreements speaks eloquently to the absence of international consensus regarding multilateral international trade agreement.¹⁸⁰

Concurrently with the evaporation of political will and idealism among the GATT founding states, the GATT admitted a diverse lot of new members and grew from twenty-two founding members¹⁸¹ to nearly one hundred parties today. New members, many of them LDCs, introduced new concerns and issues into the GATT membership and thereby dissipated ever more the initial consensus and momentum of the founding GATT members.¹⁸² Forging consensus and compromise among one hundred nations takes a very long time. Furthermore, as the time required to build consensus *among* the GATT membership passes, internal political parties and policies governing *within* the hundred GATT member states shift.¹⁸³ How, therefore, can one hundred nations reach consensus if their internal policy goals regarding the GATT negotiations shift autonomously?

In sum, the decades following the founding of the GATT witnessed two fundamental political changes affecting the institution. First, as the Second World War and the economic instability that preceded and accompanied it receded from the political consciousness and were replaced by new preoccupations, the GATT lost the momentum of a unified, driving political will. Second, dozens of states were admitted to the institution. Their admission further diluted whatever unified will and consensus remained among the founders and introduced new agendas, none of which achieved the same level of dominance and momentum as those that had animated the founders.

3. *Multilateralism in the GATS*

The political weaknesses in the process that produced the GATT have colored the GATS as well. The GATS manifests the debilitating compromises required to achieve so-called agreement on services trade among groups as diverse as the GATT membership or GNS. Some significant services sectors, such as aviation services, are altogether excluded from its scope.¹⁸⁴ Other major sectors such as financial services, audiovisual services, shipping, and telecommunications are covered only by an agreement to continue negotiations

179. MONOPOLKOMMISSION, *supra* note 2, para. 1141; SPERO, *supra* note 2, at 117-18.

180. *See infra* part IV.A.

181. BERNT & WEISS, *supra* note 2, at 104.

182. Brand, *supra* note 2, at 120-21; Davey, *supra* note 2, at 62; Klaiman, *supra* note 2, at 675 n.135; Nayyar, *supra* note 23, at 38 ("[T]he GATT framework . . . was developed in the context of a specific historical conjuncture largely by countries at similar levels of industrialization and development, while the less developed countries were subsequently provided for through exceptions to the rules.").

183. *See* Jackson, *Recent Problems*, *supra* note 2, at 1-2.

184. Dodwell, *supra* note 8.

because GNS participants were unable to achieve substantive agreement.¹⁸⁵

The political compromises required to reach a semblance of agreement on services by the conclusion of the Uruguay Round also undercut the obligations of general application undertaken by the parties to the GATS. Some obligations undertaken by GATS members are phrased in permissive, not mandatory, terms.¹⁸⁶ Other obligations, such as those concerning harmonization of national regulatory schemes, market access, and national treatment, are qualified by exceptions within the individual country schedules.¹⁸⁷ Still other obligations concerning such fundamental issues as the status of developing countries, standards and licensing, competition policy, emergency safeguard measures, government procurement, and subsidies, are unresolved pending future negotiations.¹⁸⁸

Any attempt to approach as contentious an issue as services trade liberalization on the same multilateral basis adopted by the GATT and the GNS in drafting the GATS cannot yield meaningful results within a reasonable time frame. An approach as all-inclusively multilateral as that of the GATT could only succeed in the services trade context if political developments were again to elevate one state or a small group of states to the same degree of world dominance enjoyed by the western Allies immediately after the end of World War II.

In summary, the approach to trade liberalization taken in the GATT and GATS rests upon four fundamental principles: MFN treatment, national treatment, institutionalized dispute resolution, and multilateralism. While this approach represents a highly ambitious, laudable effort, it requires substantial modification to advance services trade liberalization. Because of economic differences between services and goods (which are covered), and because of inherent flaws in the GATT approach, it is best to pursue services trade liberalization outside the GATT framework.

IV. A PROPOSAL FOR SERVICES TRADE LIBERALIZATION

Services trade liberalization agreements should be grounded in five elements. Agreements should initially be negotiated among comparatively small groups of states united by their pursuit of defined goals; incorporate dispute resolution mechanisms along an adjudicatory model; incorporate multiple tiers of membership, with objective regulatory-reciprocal trade liberalization obligations defining each tier; be limited to related industrial

185. *Id. See, e.g.,* Gillian Tett, *Financial Services Demand*, FIN. TIMES, Mar. 23, 1994, at 4 (disagreement between the United States and EU over financial services).

186. *See, e.g.,* GATS, *supra* note 8, art. VII(1) (recognizing certain national regulatory schemes by other member states).

187. *See, e.g., id.* arts. VI, XVI, XVII. *See also supra* text accompanying note 94 for an example of the extent to which qualifications by member states may undercut a GATS obligation.

188. *See, e.g.,* GATS *supra* note 8, arts. IV, VI(4), IX, X, XIII, XV.

sectors; and incorporate a competition policy. These five elements both reflect the substantive criticisms reviewed earlier and incorporate procedural modifications to the operational political process by which trade agreements are negotiated.

The approach proposed here aims to define trade liberalization goals that may be attained reasonably and expeditiously while at the same time retaining incentives for further trade liberalization. An ambitious approach modeled on the GATT, seeking to apply one comprehensive treaty with rules that simultaneously govern most nations and industries, will not yield optimum results within a reasonable time frame. Instead, this article suggests that developing realistic, attainable trade liberalization goals involves fine definition of the participating states, of the rules to which the states agree, and of the industrial sectors covered to ensure that participating states are sufficiently united by common interests to allow effective and expeditious agreement.

I do not suggest abandoning the GATT-GNS approach in proposing an alternative. Instead, these discussions should be supported as they wind their way to further liberalization and reform in the coming decades in future rounds of negotiations. However, more modest but tangible gains need not be deferred in the meantime, but may be attained now via the proposed approach by states and industries that are more readily willing to liberalize services trade.

A. *Targeted Multilateralism*

Services trade agreements should be negotiated bilaterally or among small groups of states that share a common objective.¹⁸⁹ Once negotiated, such treaties should remain open for membership to other willing participants on a take-it-or-leave-it basis.¹⁹⁰ Several considerations drive this proposal.

The political development of the GATT and GNS demonstrates that a group of states not united by a common goal cannot negotiate productively. Therefore, the United States and other states seeking to liberalize services trade should not include in their negotiations states fundamentally averse to liberalization so that negotiations do not become unproductive and agreements are not reduced to the lowest common denominator.¹⁹¹

189. See, e.g., MONOPOLKOMMISSION, *supra* note 2, para. 1149; Kasper, *supra* note 67, at 102-03 (proposing "targeted multilateral agreement" in aviation services); see also Shane, *supra* note 55, at 2, 5 (arguing for multilateral aviation services trade liberalization negotiations among United States and EU states).

190. Of course, such treaties should contain provisions for amendment.

191. Indeed, United States Trade Representative Clayton Yeutter had argued that the United States could convene services trade liberalization negotiations outside the GATT framework if LDCs persisted in obstructing progress within the GATT. Berg, *supra* note 6, at 13-14; see also Kasper, *supra* note 67, at 103; MONOPOLKOMMISSION, *supra* note 2, para. 1149 (proposing negotiation of free trade area including at least EU, North America, and Japan and thereby contemplating non-inclusion of much of rest of world).

The success of treaties limited to like-minded states underscores the value of targeted multilateralism. For example, because the EU states share common economic and security goals, they have been able to agree on an organic treaty that includes broad rights of free movement of goods¹⁹² and workers,¹⁹³ rights of establishment,¹⁹⁴ and rights to provide services;¹⁹⁵ competition law;¹⁹⁶ and institutions with autonomous legal personality to enforce these rules.¹⁹⁷ Such liberalization steps are unthinkable within the GATT context. Had they been forced to include eighty other states in their negotiations, many of which bitterly oppose such liberalization, the EU states would have been unable to realize gains from such liberal trade within the EU market.

The U.S.-Canada-Free Trade Agreement¹⁹⁸ presents another example of the results that targeted multilateralism can achieve. For many traded services, this agreement grants rights of national treatment,¹⁹⁹ establishment, and liberalized access to local distribution systems;²⁰⁰ liberalizes government procurement of services;²⁰¹ relaxes investment rules,²⁰² NTBs,²⁰³ immigration rules,²⁰⁴ and subsidies;²⁰⁵ and protects intellectual property rights.²⁰⁶ The United States-Israel Free Trade Area Agreement,²⁰⁷ which specifically applies to services,²⁰⁸ likewise illustrates the benefits of limiting negotiations to willing participants.²⁰⁹ These three treaties demonstrate that

192. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY AS AMENDED BY SUBSEQUENT TREATIES [EEC TREATY], arts. 9, 30, 34, 95.

193. *Id.* arts. 48-51.

194. *Id.* arts. 52-54.

195. *Id.* arts. 57, 59.

196. *Id.* arts. 85, 86.

197. The primary EU institutions are the Commission of the European Communities, the Council of Ministers, the European Court of Justice, and the European Parliament. *See id.* arts. 137, 145, 155, 164.

198. Free-Trade Agreement, Dec. 23, 1987, U.S.-Can., 27 I.L.M. 281. This treaty was incorporated into U.S. domestic law by the United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, 102 Stat. 1851, *as amended by* Pub. L. No. 101-207, § 1(b), *as amended by* Pub. L. No. 101-382, Title I, §§ 103(b), 134(b) (codified as a Note to 19 U.S.C.A. § 2112 (1993)) [hereinafter US-CFTAIA].

199. *Id.* § 304(b)(1)(B); *see* McCulloch, *supra* note 21, at 344.

200. US-CFTAIA, *supra* note 198, § 304(b)(1)(C); *see* McCulloch, *supra* note 21, at 344.

201. US-CFTAIA, *supra* note 198, § 304(a)(1)(E), (b)(1)(D).

202. *Id.* § 304(a)(1)(B), (b)(2)(A); *see* McCulloch, *supra* note 21, at 344.

203. US-CFTAIA, *supra* note 198, § 304(b)(1)(A).

204. *Id.* § 307; McCulloch, *supra* note 21, at 344.

205. US-CFTAIA, *supra* note 198, § 304(b)(1)(A).

206. *Id.* § 304(a)(1)(C), (b)(3).

207. Agreement on the Establishment of a Free Trade Area, Apr. 22, 1985, U.S.-Isr., 24 I.L.M. 653 [hereinafter Israel Agreement]. This treaty is implemented in U.S. domestic law by the United States-Israel Free Trade Area Implementation Act of 1985, Pub. L. No. 99-47 (codified as a Note to 19 U.S.C.A. § 2112 (1993)) [hereinafter US-IFTAIA].

208. Israel Agreement, *supra* note 207, art. 16.

209. The treaty is the first trade pact ever negotiated that pertains to trade in a complete range of services, including transportation, travel, tourism, communications, banking, insurance, construction engineering, accounting, education, law, management consulting, computer services, and advertising. Rivers et al., *supra* note 6, at 22. If the U.S. and Israel had waited for progress among the GATT membership generally, contemplation of such comprehensive trade liberalization would have eluded them

more concrete and rapid steps to liberalize services trade may be achieved when negotiations include only a targeted group of states. The split between GATT members unwilling to discuss services and the GNS illustrates that even GATT members recognize the need to choose participants to services trade liberalization discussions.

Efforts to bypass the GATT further suggest general international impatience with the extreme multilateralism of the GATT. Prominent examples of such efforts include the approximately two hundred side agreements among groups of GATT members,²¹⁰ circumvention of GATT procedures via bilateral and regional treaties over the past ten years,²¹¹ such as the North American Free Trade Agreement (NAFTA),²¹² the Southern Cone Common Market (MERCOSUR),²¹³ the European Economic Area (EEA),²¹⁴ the Central American Common Market,²¹⁵ and the proposed Asean Free Trade Area (AFTA).²¹⁶

Services trade agreements must not become tools of exclusion that aid in the formation of hostile trading blocs.²¹⁷ Membership should remain open to all states that eliminate comparable trade restrictions and meet objective standards of *regulatory* reciprocity.²¹⁸ The benefits of trade liberalization among treaty members²¹⁹ would then induce nonmember states to relax trade

for decades to come.

210. MONOPOLKOMMISSION, *supra* note 2, para. 1143.

211. *Id.* para. 1142.

212. North American Free Trade Agreement, Dec. 8 and 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289 (1993) [hereinafter NAFTA]. Interestingly enough, Taiwan has expressed an interest in joining NAFTA. *Calling Poland and Taiwan*, ECONOMIST, Mar. 13, 1993, at 19 [hereinafter *Calling Poland*].

213. Treaty Establishing a Common Market, Mar. 26, 1991, Arg.-Braz.-Para.-Uru., 30 I.L.M. 1041. Parties to the treaty agreed to eliminate all tariffs within the common market and to establish a common external tariff by 1994. *Id.* art. 1; see also Rebecca D. Dandeker, *The Rose Garden Agreement: Is MERCOSUR the Next Step to a Hemispheric Free Trade Zone?*, 24 LAW & POL'Y INT'L BUS. 157, 159 (1992). A Brazilian official characterized MERCOSUR as a priority for trade relations, to be settled before its members consider applying for membership in NAFTA. Minister Silvio Amaral, Embassy of Brazil, Washington, D.C., Remarks at the Association of the Bar of the City of New York, Conference on the Future of Economic Integration in the Americas, Mar. 24, 1993. If its members view MERCOSUR to be a priority trade issue to be resolved prior to their consideration of membership in NAFTA, one may only wonder where on their agenda multilateral GATT efforts rank.

214. Agreement on the European Economic Area, May 2, 1992, LEXIS, Intlaw Library, Bdiel File. The EEA consists of the twelve EU nations plus Austria, Finland, Iceland, Norway, and Sweden. David Gardner, *EEA Links 17 Nations in World's Largest Free Trade Zone*, FIN. TIMES, Jan. 1, 1994, at 1.

215. The Central American Common Market, encompassing Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama, was established in 1960 with the General Treaty on Central American Economic Integration. Edward Orlebar, *Vision of Unity for Embattled Central America*, FIN. TIMES, Nov. 3, 1993, at 8.

216. AFTA is expected to encompass Singapore, Malaysia, Thailand, Indonesia, the Philippines, and Brunei, which together count 320 million inhabitants and thus could become as significant a regional grouping as are the EU and NAFTA signatories. Kieran Cooke et al., *Asean Free Trade Zone Sputters into Action*, FIN. TIMES, Jan. 26, 1993, at 3. Mexico is also currently negotiating free trade agreements with Venezuela, Colombia, Bolivia, and Costa Rica. Stephen Fidler & Damian Fraser, *Mexico Plans S. American Trade Pact*, FIN. TIMES, Oct. 13, 1993, at 4.

217. See, e.g., Nicolaides, *supra* note 6, at 134; see also MONOPOLKOMMISSION, *supra* note 2, para. 1150.

218. See *infra* note 234 and accompanying text.

219. See *supra* part III.A.

restrictions in order join. Leaving services trade treaties open for membership by all comers on objective terms allows smaller states with little clout in political negotiations equal access to trade liberalization.

The operation of regional agreements has demonstrated that definition of treaty participants on a regional basis need not cause the formation of hostile trading blocs that may, on balance, restrict world trade. Instead, these agreements may advance trade liberalization as states that are not participants in a successful regional grouping seek membership in that group and thereby extend the benefits of trade liberalization over a wider area. For example, the U.S.-Canada Free-Trade Agreement has grown to include Mexico and has thereby become NAFTA; states as disparate as Taiwan and Chile now appear to be future candidates for inclusion in NAFTA.²²⁰ The European Community has also grown to include multiple new members and has recently become the European Union; other states, such as members of the former Soviet-bloc and non-EU members of the EEA, are standing by, ready to join in the future.²²¹

Initially narrow regional trade liberalization efforts can thus serve as a catalyst, spreading trade liberalization over wider areas. Again, I aim to define participants in trade liberalization discussions on the basis of regional, or other, common interests to achieve relatively rapid, incremental, progressive liberalization wherever it is possible.

B. *Dispute Resolution Mechanism*

Services trade agreements should include access to a dispute resolution mechanism based on an adjudicatory model.²²² The elements of this proposal are designed to address the difficulties associated with the GATT and GNS that were identified earlier.²²³ First, individual complainants should have the right to bring private actions to enforce treaty rules.²²⁴ This would eliminate the delay and uncertainty of the GATT-based approach, which forces individual complainants to lobby their national governments to champion an issue before foreign governments. This would also benefit true multinational service providers that have significant investments within multiple states but

220. See *Calling Poland*, *supra* note 212, at 19. See also John Barnam & Angus Foster, *Teething Troubles Nag at Mercosur Market*, FIN. TIMES, Jan. 7, 1994, at 6 (noting possible Chilean interest in joining NAFTA).

221. See Lionel Barber, *East Europe Calls EC's Bluff over Free Trade*, FIN. TIMES, April 16, 1993, at 6 (noting interest of Eastern European states in joining EU).

222. MONOPOLKOMMISSION, *supra* note 2, paras. 1140, 1144, 1146; Berg, *supra* note 6, at 12; Gibbs & Mashayekhi, *supra* note 32, para. 12; Maffucci, *supra* note 11, at 405-08; Nicolaides, *supra* note 6, at 133; Rivers et al., *supra* note 6, at 25; see also text accompanying *supra* note 134 (regarding disadvantages of consensus-oriented dispute resolution model).

223. See *supra* part III.D.

224. This is proposed elsewhere as well. See, e.g., MONOPOLKOMMISSION, *supra* note 2, para. 1144.

no clear home-country government to defend them.²²⁵

In addition, a private right of action would address the infrequent application of the GATT dispute resolution mechanism. When the national courts of parties to a treaty apply national laws instead of treaty rules in situations of potentially overlapping jurisdiction, the treaty loses relevance and credibility. The GATT mechanism represents an extreme situation in that it has little relevance to the vast majority of mundane trade disputes. A private right of action would increase the number of cases handled by the treaty mechanism because individual complainants would no longer need to depend upon the limited resources of a relatively small number of government officials to serve as advocates in hundreds of annual trade disputes.

Second, parties to a services treaty should have an absolute right to initiate the formal dispute resolution process. This would eliminate the delay and uncertainty inherent in negotiations under the GATT, where a grievant must negotiate sufficient support within the GATT Council to obtain appointment of a panel.²²⁶

Third, compliance with the decisions of the mechanism should be mandatory and supported by enforcement measures.²²⁷ Parties found to be in violation of treaty rules should not be able to frustrate the process by refusing to abide by decisions. Instead, sanctions, most likely in the form of withdrawal of significant concessions by other parties, should be available and actually used to compel compliance.

Fourth, the decisions rendered by the mechanism should establish a system of precedent binding on parties to the dispute resolution process.²²⁸ This would decrease uncertainty and risk in international services transactions, which tend to impede trade.

Fifth, to avoid national biases, dispute resolution panels should be multinational. The mechanism should follow the model of binational adjudicatory panels within the U.S.-Canada Free Trade Agreement²²⁹ and international judicial panels within the EU context.

If states negotiate services trade agreements on a targeted multilateral basis and, as proposed below, on a sectoral basis,²³⁰ numerous individual treaties may result. Establishing numerous binational adjudicatory panels for

225. See, e.g., Brand, *supra* note 2, at 136-38 (presenting examples of such multinational services providers).

226. See Davey, *supra* note 2, at 91-92.

227. See, e.g., MONOPOLKOMMISSION, *supra* note 2, para. 1144; Davey, *supra* note 2, at 90-91. But see Klaiman, *supra* note 2, at 677-80. Klaiman's concerns do not apply here as this proposal does not advocate an all-encompassing multilateral approach modeled on the GATT as does Klaiman.

228. See, e.g., Davey, *supra* note 2, at 91 (referring to utility of more developed "corpus of GATT law"); Klaiman, *supra* note 2, at 684.

229. See *supra* note 143; see also Tycho H.E. Stahl, *Problems with the United States Anti-Dumping Law: The Case for Reform of the Constructed Value Methodology*, 11 INT'L TAX & BUS. LAW. 1, 24 (1993) (noting Canadian insistence upon binational appellate panels to avoid national bias).

230. See *infra* part IV.D.

each sector or tier²³¹ could be very costly. It may thus be beneficial for trade agreements to refer trade disputes to a multinational adjudicatory organ, perhaps to a standing "Superpanel"²³² or even to the International Court of Justice.

Sixth, in consonance with the proposal for a sectoral approach to services trade liberalization, effective dispute resolution mechanisms under existing international agreements should be retained.²³³

Finally, the multi-tiered approach proposed below may be crucial to the success of the proposed type of adjudicatory dispute resolution system. Given the disagreement over the use of an adjudicatory model to address international trade disputes,²³⁴ such a system may need to be reserved to members of a higher treaty tier; however, I do not advocate this, as an effective dispute resolution mechanism is of fundamental importance.

C. *Multiple Tiers of Reciprocal Liberalization Obligations*

Services trade agreements should incorporate multiple tiers of membership, with each tier characterized by objective, regulatory-reciprocal trade liberalization obligations. *Regulatory* reciprocity involves agreement to harmonize regulatory schemes, regardless of the degree of liberalization that each participant must undertake to reach the agreed level of regulation. Thus, regulatory reciprocity would require greater liberalization by restrictive states. In contrast, *negotiating* reciprocity involves the exchange of economically equivalent concessions, but will not necessarily yield the same objective level of liberalization among treaty members.²³⁵ Substantive legal rules designed to attain regulatory, rather than negotiational, reciprocity would include a conditional MFN obligation as well as a national treatment obligation that addresses NTBs to services trade on a sectoral basis.

1. *Multiple Tiers of Membership*

Services trade agreements should maintain multiple tiers of membership, with each tier characterized by objective regulatory-reciprocal trade liberalization obligations.²³⁶ Such a scheme would encourage participation

231. See *infra* part IV.C.

232. Davey, *supra* note 2, at 103-05.

233. See, e.g., Comlish Letter, *supra* note 63 (commercial aviation services); Simpkins Letter, *supra* note 63 (commercial maritime, trucking, and aviation services); Dean Letter, *supra* note 63, at 2 (commercial aviation services).

234. See *supra* text accompanying note 134 (noting disadvantages of consensus-oriented dispute resolution models).

235. Nicolaidis, *supra* note 6, at 128-30.

236. The proposal for multiple tiers of membership to trade agreements is most likely attributable to Professor John H. Jackson. See, e.g., JOHN H. JACKSON, *RESTRUCTURING THE GATT SYSTEM* 95-96, 84-87 (1990). Others have advocated the multi-tiered approach as well. E.g., Gibbs & Mashayekhi, *supra* note 32, at 105; see also Davey, *supra* note 2, at 106-07 (reviewing and rejecting repeated proposals for

in trade liberalization while at the same time setting attainable goals and retaining incentives for further liberalization. The case of aviation services may illustrate this structure. The Chicago Convention²³⁷ defined six "freedoms" of the air.²³⁸ Restrictions on the exercise of these freedoms by foreign air carriers present NTBs to aviation services trade. Such barriers are common; the fifth and sixth freedoms in particular are rarely granted by national governments.²³⁹ In a multiple-tier, sectoral treaty on aviation services, for example, the first tier could include those states willing to relax restrictions only on the first four freedoms of the air. The next tier could include those willing to grant the first five freedoms, while the third could include those willing to grant all six.²⁴⁰

This approach presents several advantages. First, it would allow at least partial liberalization of aviation services trade over more markets than would be possible were the treaty to have only one tier granting all six freedoms. Those states willing to grant and receive all six freedoms, however, would not need to settle for a lower degree of liberalization just to include a larger group of states within the treaty. Second, it presents incentives for further liberalization: if the additional grant of the sixth freedom upon accession to the third tier appears advantageous, lower-tier states may join the higher tier and liberalize further. Third, objective criteria, not negotiational prowess, determine membership in the treaty and its tiers. Either foreign carriers are allowed to provide domestic service, or they are not: this could be a test for membership in the third tier. Fourth, emphasis of regulatory over negotiating reciprocity allows even states with no further negotiating concessions to offer opportunities for further market access.²⁴¹ Finally, use of objective membership criteria addresses free-rider problems²⁴² by facilitating use of the conditional MFN obligation as discussed below.

This simplified illustration referred to NTBs specific to the aviation

two tiers of dispute resolution obligations); Nicolaidis, *supra* note 6, at 135 (discussing Jackson's proposal).

237. This convention, held in Chicago in 1944, established the International Civil Aviation Organization to set safety and technical standards and to aid the development of international civil aviation after WWII. WEISMAN, *supra* note 21, at 12.

238. These freedoms are the freedoms (1) to fly across another country without landing; (2) to land abroad for technical reasons such as refueling; (3) to offload passengers in a foreign country taken on in the home country; (4) to take on traffic in a foreign country for offloading in the home country; (5) to carry passengers between two or more specified countries outside the home country; and (6) to fly passengers internally on domestic trips entirely within a country outside the home country (known as *cabotage*). Secretariat of the International Civil Aviation Organization, Multilateral Agreements which Affect the Regulation of International Air Transport 2 (background memorandum provided to participants in the *World-Wide Air Transport Colloquium*, Montreal, Apr. 6-10, 1992); see also WEISMAN, *supra* note 21, at 13-14; Gibbs & Mashayekhi, *supra* note 32, at 104.

239. WEISMAN, *supra* note 21, at 13-14.

240. Members of the third tier would grant first- and second-tier members only the first four and first five freedoms, respectively. Third tier members, however, would grant one another all six freedoms of the air.

241. See Shane, *supra* note 55, at 3.

242. See *supra* part III.B.

services sector. Other factors that could be relevant to defining tiers within services trade liberalization agreements include a willingness to relax immigration and investment rules, the multiple regulatory schemes that are very specific to particular services industries,²⁴³ and willingness to accede to a particular dispute resolution mechanism. The system of tiers and application of objective criteria transforms the MFN obligation into a conditional one.

2. Conditional MFN

Conditional MFN, as proposed here, means that only states willing to meet objective criteria of regulatory reciprocity may receive MFN treatment and membership in a treaty or in one of its higher tiers.²⁴⁴ States in lower tiers receive MFN treatment only regarding those objective standards to which they accede.²⁴⁵ Several considerations drive this proposal.

First, conditional MFN as proposed here avoids the free-riding problems inherent in the unconditional MFN obligation of the GATT-based approach.²⁴⁶ States receive MFN treatment conditioned upon their willingness to meet certain objective criteria of liberalization from services trade barriers. Because conditional MFN does not require a state to treat all its trading partners equally whether or not the others grant regulatory reciprocity, free-riding becomes impossible.

Second, the elimination of free-rider effects removes perverse incentives that impede liberalization agreements and provides affirmative incentives to liberalize. Indeed, states like the United States that aim to eliminate services trade impediments may then use the grant of domestic market access rights as a tool for prying open foreign markets.

3. National Treatment and NTBs

The national treatment obligation, as was argued earlier, is essential to services trade liberalization.²⁴⁷ It is intended to eliminate discriminatory national regulations that exclude foreign services providers while allowing governments to retain regulatory control over particularly sensitive services sectors.²⁴⁸ The GATT-based approach does not carry national treatment far enough to address those NTBs that particularly inhibit services trade.

243. See, e.g., *supra* note 87.

244. In GATT parlance, what is proposed here is known as "code conditionality." JACKSON, *WORLD TRADING*, *supra* note 2, at 137; Nicolaides, *supra* note 6, at 134.

245. See, e.g., OECD, *supra* note 33, at 30, 49 (discussing conditional MFN relevant to telecommunications and computer-based services trade resulting from divergent levels of intra- and international trade liberalization); Nicolaides, *supra* note 6, at 134; Rivers et al., *supra* note 6, at 24.

246. See *supra* part III.B.

247. See *supra* part III.C.

248. See *supra* part II.C.

National regulatory schemes are rife with NTBs that particularly impede services trade. National regulations that force foreign services providers to mimic domestic firms may unreasonably exclude foreigners.²⁴⁹ Rampant restrictions on immigration, foreign investment, and foreign establishment are particularly noxious. As noted, provision of services generally requires contact between producers and consumers,²⁵⁰ which means that individuals and productive assets must generally be able to cross national borders for services trade to take place. Because NTBs interfere with such contact and hence impede trade, they should be addressed by services trade agreements.²⁵¹

Other NTBs that interfere with services (and goods) trade include foreign exchange controls, government procurement policies, industry-specific national regulatory regimes, subsidies to domestic producers, limits on repatriation of profits, restrictions on foreign ownership, restrictions on importation of foreign equipment, licensing and certification requirements, absence of uniform international standards, state-sanctioned monopolies, inadequate protection of intellectual property,²⁵² restrictions on establishment by foreign firms,²⁵³ and trade-related investment measures (TRIMs).²⁵⁴ Such restrictions must be addressed by any regime seeking to liberalize services trade.

Three elements of the proposed approach are calculated to simplify negotiations to eliminate the effects of NTBs on services: treaties should include targeted groups of states, maintain multiple tiers of membership, and be negotiated on a sectoral basis. States so averse to removing NTBs that they would frustrate negotiations would not participate.²⁵⁵ States willing to relax

249. See, e.g., *supra* note 87 (providing an example concerning the regulation of investment advisers).

250. See *supra* part II.B.

251. Maffucci, *supra* note 11, at 402-03; Rivers et al., *supra* note 6, at 23-29.

252. JACKSON, *WORLD TRADING*, *supra* note 2, at 130-31; OECD, *supra* note 33, at 23-29; SPERO, *supra* note 2, at 101; Benz, *supra* note 11, at 99-107; Berg, *supra* note 6, at 8-9; Gibbs & Mashayekhi, *supra* note 32, at 85-86, 103; Gold, *supra* note 6, at 294-97; Jackson, *Future Institutions*, *supra* note 2, at 24-5; Lee, *supra* note 46, at 117-18; Maffucci, *supra* note 11, at 384-87; Markusen, *supra* note 26, at 95; Keith E. Maskus, *Normative Concerns in the International Protection of Intellectual Property Rights*, 13 *WORLD ECON.* 387 (1990); McCulloch, *supra* note 21, at 341; Nayyar, *supra* note 23, at 42-43; Rivers et al., *supra* note 6, at 26; Whitford, *supra* note 6, at 130-31.

253. An OECD study concludes that

[a telecommunications] firm . . . may consider that it needs establishment in order to offer a service on a competitive basis, to provide support services or because of differences in national business practices, language and cultural differences. Establishment of foreign service firms should be allowed for effective market access. The choice of the preferred means of providing the service should remain as far as possible with the firm.

OECD, *supra* note 33, at 23; see also Landry Letter, *supra* note 63; Shane, *supra* note 55, at 7-8 (foreign ownership and investment restrictions on U.S. airline industry).

254. David Greenaway, *Trade Related Investment Measures: Political Economy Aspects and Issues for GATT*, 13 *WORLD ECON.* 367 (1990).

255. Some states are so opposed to the elimination of NTBs that it is pointless to include them in such liberalization negotiations, as is illustrated by an argument by an Indian government official:

The inappropriateness of [including a certain liberalization obligation in the GATS] . . . was first pointed out by us. . . . We have argued that such equivalent treatment for foreign enterprises amounts to a guarantee of equal opportunity to foreign nationals and foreign enterprises by the national government, which has no basis in any other field of economic endeavor. Does

some but not all NTBs could be members of a lower tier within the agreement. With these proposed modifications, the delays and often fruitless negotiations that have characterized the GATT may be avoided.²⁵⁶

D. Sectoral Approach

Negotiations on a sectoral basis would allow the parties to focus on the details of diverse and idiosyncratic national regulatory schemes that impede services trade.²⁵⁷ Individual agreements should be specific to one or several interrelated regulatory schemes. In practice, this would mean that agreements on market access by professionals, financial institutions, airlines, and telecommunications firms would be negotiated separately. At least several U.S. services industries vehemently support this approach.²⁵⁸

Several concerns drive this proposal. First, a sectoral approach is required to resolve the technical, idiosyncratic, and usually sector-specific, regulatory NTBs that restrict trade within the diverse spectrum of services industries.²⁵⁹ A great weakness of the GATT-based approach of the GNS lies in its attempt to articulate rules to govern multiple industries and states simultaneously.²⁶⁰ Broad rules of general application are not sufficient to resolve technical, idiosyncratic regulatory NTBs.

Technical SEC rules restricting U.S. share distributions by foreign investment funds,²⁶¹ for instance, have no relation to restrictions upon foreign airlines imposed by landing slot allocation schemes²⁶² other than that both impede trade in their respective industries. It would be difficult, if not impossible, to construct a broad, general rule of national treatment or market access that would eliminate both of these NTBs at once. Instead, the myriad of such regulatory rules that apply to industries in modern economies must be addressed individually if such NTBs are to be eliminated.²⁶³

any government permit equality of opportunity to foreigners? It is obvious that what may be appropriate in the OECD context may not be appropriate in the multilateral context.

Randhawa, *supra* note 30, at 169-70.

256. See *supra* part III.E.2.

257. See, e.g., Gibbs & Mashayekhi, *supra* note 32, at 104 ("Given the heterogeneity of services, concrete solutions are probably most feasible in self-contained, individual service sectors.")

258. Comlish Letter, *supra* note 63 (commercial aviation); Landry Letter, *supra* note 63 (commercial aviation); Shane, *supra* note 55; Simpkins Letter, *supra* note 63 (maritime, trucking, and commercial aviation industries).

259. SPERO, *supra* note 2, at 102; Benz, *supra* note 11, at 96-97. Others have taken a contrary position. See, e.g., Maffucci, *supra* note 11, at 402.

260. This is illustrated by the inability of the GNS to resolve barriers to services trade in aviation, financial, audiovisual, shipping, and telecommunications services sectors. While GNS participants agreed on the abstract, general principles of the GATS, they could not resolve differences over the minutiae of national regulatory schemes that actually impede international trade in these services.

261. See *supra* note 87.

262. Shane, *supra* note 55, at 6-7.

263. A broad rule of national treatment will not by itself grant market access so long as the underlying, industry-specific regulations restricting market access are not eliminated. National treatment "fails to deal effectively with the problem of barriers to entry and restrictive domestic regulations imposed by illiberal countries." Kasper, *supra* note 67, at 101-02.

Specialized bodies of regulation in different services sectors are enforced and administered by separate, specialized agencies within each national government.²⁶⁴ Detailed and specialized expertise, which is difficult to attain through a multi-sectoral approach, is therefore required to resolve the specialized NTBs and regulations relevant to each service sector. Negotiations that simultaneously review tens of thousands of unrelated industry-specific NTBs on a country-by-country basis would likely become protracted, or would be so cursory as not to resolve each idiosyncratic NTB. Either situation would defeat the aim of liberalizing services trade. It is precisely because of this required degree of detailed expertise that the Division of Investment Management of the SEC, for example, has proposed that trade liberalization negotiations regarding the investment company industry take place between the relevant national regulatory agencies.²⁶⁵

Second, focusing negotiations on a sectoral basis further helps to define trade liberalization goals that are reasonably and expeditiously attainable. For instance, attempts to eliminate immigration restrictions for all industries at once will in all likelihood founder as the United States and other DCs continue to exclude unskilled immigrants seeking higher wages. Negotiations on a sectoral basis, however, may yield results because DCs are much more willing to admit highly skilled professionals. I do not argue that such limitations represent the idealistic, optimum goal. Rather, given the demonstrated impossibility of immediate and complete liberalization, I aim to achieve incremental, reciprocal liberalization wherever it is possible.

Third, when negotiations are not concentrated on a sectoral basis, the lack of progress in restrictive industries could hold back liberalization in other industries.²⁶⁶ It does not make sense, for instance, to hold the elimination of restrictions on aviation services trade on the New York-Paris route hostage

264. SPERO, *supra* note 2, at 102.

265. The Division proposes that foreign investment companies could be exempted from requirements of the U.S. Investment Company Act that would likely exclude them from the U.S. market if the foreign law under which a fund operates . . . serve[s] the same purposes as the protections under provisions of the Investment Company Act from which the [foreign] fund requests exemption. . . .

The Division anticipates that it will be difficult to make detailed findings about the adequacy of foreign law, particularly if there exists a gap between the law as written and as actually practiced. To address this concern, the Division's proposal would require the . . . [SEC] to enter into bilateral regulatory memoranda of understanding with the securities authorities in countries with regulatory regimes providing the same type and quality of investor protection as provided by the Investment Company Act. The memorandum would set forth representations about the nature and extent of foreign regulation. . . .

In addition, the memoranda would create a framework for regulatory cooperation and mutual recognition of investment company regulatory practices. They would establish the basis not only for exempting a foreign investment company from regulation under the Investment Company Act, but also for allowing United States funds to satisfy foreign regulatory requirements to the degree necessary to provide them complementary access into foreign countries.

DIVISION OF INVESTMENT MANAGEMENT, *supra* note 87, 206-07 (footnote omitted); *see also supra* note 87.

266. Kasper, *supra* note 67, at 100.

to the resolution of market opening discussions regarding the Brazilian and Indian insurance industries.²⁶⁷

Fourth, sectoral negotiations avoid quantification difficulties inherent in services trade negotiations.²⁶⁸ If, for instance, the United States were to permit EU telecommunications operators access to U.S. markets in return for a grant of "sixth freedom" rights for U.S. airlines in the EU, it would be difficult to determine whether this was an exchange of equivalent concessions. My approach eliminates this difficulty by limiting negotiations to regulatory-reciprocal concessions within the same or related industries.

Fifth, sectoral negotiations avoid the fundamental lack of logic to the cross-sectoral horse-trading practiced in the GATT.²⁶⁹ Cross-sectoral concessions are not regulatory-reciprocal. In the example involving an exchange of airline for telecommunications market access rights, U.S. airlines would gain at the expense of U.S. telecommunications companies and EU airlines, while EU telecommunications companies would benefit at the expense of EU airlines and U.S. telecommunications companies. Such a distribution of gains and costs is unlikely to be the product of rational analysis, but rather of varying degrees of lobbying and access to the political process. In addition, access to U.S. markets by EU telecommunications companies could no longer be used as a carrot to induce opening of EU markets to U.S. telecommunications companies, because EU telecommunications companies would already have received access to U.S. markets without having made any concessions themselves. This difficulty would be eliminated if liberalization in the telecommunications and airline industries were negotiated separately.

The success of existing sectoral agreements underscores the value of the proposed approach. Shifting responsibility for services negotiations over all sectors to the GNS would entail abandoning some very successful sectoral agreements such as the International Air Transport Association (IATA) and International Civil Aviation Organization (ICAO), the World Intellectual Property Organization (WIPO), the International Telecommunications Union (ITU), the International Maritime Organization, and UNCTAD, among others.²⁷⁰ If responsibility for services negotiations over all sectors were shifted to the GNS, these very successful sectoral agreements would have to be abandoned. Discarding these functioning sectoral regimes for a new multi-lateral agreement under the GNS would be a considerable step backwards.

267. As noted previously, this Article is written from the perspective of the United States and other First World states with well-developed services industries.

268. See *supra* text accompanying note 41; see also Gibbs, *supra* note 18, at 213-15; Nayyar, *supra* note 23, at 39-40.

269. See *supra* text accompanying note 41; see also Gibbs, *supra* note 18, at 213-15; Nayyar, *supra* note 23, at 39-40.

270. See Comlish Letter, *supra* note 63 (aviation services); Dean Letter, *supra* note 63 (aviation services); Gibbs, *supra* note 18, at 199-204 (intellectual property, international telecommunications, and maritime services); Landry Letter, *supra* note 63 (aviation services); Shane, *supra* note 55 (aviation services); Simpkins Letter, *supra* note 63 (maritime, trucking, and commercial aviation services).

The 163-member ITU²⁷¹ serves as a good illustration of the value of a sectoral approach. ITU members have addressed numerous, highly technical NTBs specific to the telecommunications sector, such as the allocation and assignment of radio frequencies to prevent interference,²⁷² the definition of technical standards,²⁷³ the allocation of geosynchronous orbital slots for satellites,²⁷⁴ and interconnection problems.²⁷⁵ Such progress is possible among the ITU membership, which is at least as diverse and all-inclusive as that of the GATT because ITU negotiations are focused to include only sectoral experts, and ITU voting procedures, unlike those of the GATT, allow proposals to be adopted with less than unanimous consensus.²⁷⁶

The ITU has also been able to resolve development issues, such as the reservation of frequencies and geosynchronous orbital positions for LDCs that are not yet in a position to utilize them²⁷⁷ and the establishment of an infrastructure development fund to benefit LDCs.²⁷⁸ Such development issues proved intractable in multilateral GATT negotiations.²⁷⁹ In addition, the ITU permits efforts somewhat similar to the multi-tiered approach proposed here to resolve differences over deregulation. States willing to introduce competitive telecommunications markets are free to negotiate liberal agreements in which those unwilling to relax regulatory controls need not participate.²⁸⁰

In sum, the ITU has been able to resolve concrete, technical obstacles to trade in telecommunications services by resorting to several elements proposed here: effective dispute resolution not conditioned upon complete consensus; multiple tiers of agreement characterized by regulatory reciprocity; and expert discussion of sector-specific NTBs on a sectoral basis.

The elements of the proposed approach discussed thus far have centered on liberalizing services trade so as to unleash the consequent efficiency and quality gains that economic theory predicts. Consideration of the *allocation* of gains from services trade is also necessary — and will suggest that agreements for liberalization of services trade should consider issues of competition policy.

E. *Competition Policy*

Individual agreements on services trade should include a competition

271. BERNT & WEISS, *supra* note 2, at 147; OECD, *supra* note 33, at 14-15.

272. BERNT & WEISS, *supra* note 2, at 148 and 153-54.

273. *Id.* at 148.

274. *Id.*

275. *Id.* at 150, 152.

276. *Id.* at 157.

277. *Id.* at 152-53.

278. *Id.* at 154.

279. *See supra* part III.E.2.

280. BERNT & WEISS, *supra* note 2, at 155.

policy,²⁸¹ which the GATT does not.²⁸² A competition policy would ensure that income and efficiency gains from services trade liberalization accrue not just to services providers but to consumers as well. Services producers should be prevented from erecting barriers to competition in place of those that governments relax. The competition policy should thus include prohibitions on mergers in highly concentrated industries and on international private agreements to fix prices, allocate markets, and protect domestic home markets.²⁸³

Two considerations drive these proposals. First, scale and scope economies encourage international services trade, but also pose the danger of anti-competitive developments. Second, the function of the merger control regulation incorporated in the 1992 European Single Market project provides an instructive example.

1. *Scale and Scope Economies*

Scale and scope economies characterize services as diverse as commercial aviation, telecommunications, banking, information processing, finance, and law (as well as many goods sectors).²⁸⁴ Scale economies arise out of increased exploitation of underutilized, indivisible assets that present fixed costs regardless of the number of consumers served.²⁸⁵ Scope economies develop as a services producer adds additional products to the spectrum of

281. See, e.g., MONOPOLKOMMISSION, *supra* note 2, para. 1115; OECD, *supra* note 33, at 33, 52-53 (arguing that competition policy is relevant when firms grow to be dominant, although national competition policy schemes may be sufficient); Jackson, *Future Institutions*, *supra* note 2, at 24; Nicolaidis, *supra* note 6, at 133; see also Loughlin Interview II, *supra* note 64 (agreeing with such proposal, so long as competition policy does not suppress efficiency gains of trade liberalization).

282. MONOPOLKOMMISSION, *supra* note 2, para. 1139.

283. *Id.* para. 1115; Robert Pitofsky, *Proposals for Revised United States Merger Enforcement in a Global Economy*, 81 GEO. L.J. 195 (1992) (presenting legal and policy considerations relevant to enforcement of U.S. merger law in increasingly international markets).

284. BERNT & WEISS, *supra* note 2, at 6, 16 (telecommunications services); OECD, *supra* note 33, at 12 (integrated services digital networks telecommunications services); WEISMAN, *supra* note 21, at 44, 170 (telecommunications, banking, and transport services); Kasper, *supra* note 67, at 94-95 (airline services); Loughlin Interview II, *supra* note 64; Ryan, *supra* note 35, at 358-60 (banking and financial services).

285. Scale economies are reductions in the average cost of a product resulting from an expanded level of output. Increasing production while using a fixed stock of assets dilutes the proportion of fixed costs allocable to each individual unit of output, thereby lowering the average cost of production. BERNT & WEISS, *supra* note 2, at 418; WEISMAN, *supra* note 21, at 31; Pearce, *supra* note 21, at 125. See generally J. HIRSHLEIFER, *PRICE THEORY AND APPLICATIONS*, 329-42 (3d ed. 1984).

For example, in the commercial aviation sector, such indivisible assets may include aircraft, airport facilities, reservations systems, and route authorities. An increase in the number of passengers served decreases the average cost of serving each passenger by further diluting the fixed cost allocable to each passenger.

Scale economies are particularly relevant to services industries, which are characterized by high initial investment in a capital or knowledge-base, which is a fixed cost. See, e.g., BERNT & WEISS, *supra* note 2, at 6, 16 (scale economies in telecommunications); OECD, *supra* note 33, at 12 (Integrated Services Digital Networks telecommunications services); WEISMAN, *supra* note 21, at 86 (commercial aviation); Markusen, *supra* note 26, at 95 (producer services); McCulloch, *supra* note 21, at 338-39; Nayyar, *supra* note 23, at 45; Ryan, *supra* note 35, at 358-60 (noting some economies in banking and financial services).

products produced.²⁸⁶ Scope economies exist principally for two reasons. First, each additional service produced increases the overall volume of consumers served and thereby allows increased exploitation of yet underutilized indivisible assets.²⁸⁷ Second, concentrating some indivisible productive assets at nodes or hubs²⁸⁸ allows a services producer to utilize those assets more fully, which, in turn, also enables the services producer to minimize its investment in productive assets.²⁸⁹

Services producers seek to lower production costs, particularly in competitive markets. As a result, the pursuit of scale and scope economies, which lower production costs, drives services producers to hunt for ever larger markets through international expansion and trade. That scale and scope economies provide an impetus for international trade is critically important. Economic theory suggests that services trade liberalization allows efficiency gains and concomitant welfare gains to society.²⁹⁰ However, since scale and scope economies may yield oligopolistic markets in maturing industries,²⁹¹ it is also necessary to consider the *allocation* of gains from trade liberalization between consumers and producers within a society. Consequently, any attempt to liberalize international services trade must include a competition policy if the efficiency gains resulting from trade liberalization are to accrue to services

286. *Scope* economies are cost reductions from expanding the *variety* of services produced. *Scope* economies result from the greater *scale* of exploitation of indivisible investments when a variety of products are produced with the same assets. BERNT & WEISS, *supra* note 2, at 418; WEISMAN, *supra* note 21, at 5, 31-33, 44.

In commercial aviation, the scope of products offered by an airline increases as additional destinations are added to the airline network so that the airline network offers transportation between a greater number of city-pair combinations. WEISMAN, *supra* note 21, at 128 (observing that "[a]n airline's output . . . depends positively on its economies of scope and negatively on the number of airlines serving the market."), 144, 148; Kasper, *supra* note 67, at 102 (noting "importance of network access and economies of scope in air-service markets").

287. WEISMAN, *supra* note 21, at 36-37. Empirical research supports assertions of scope economies for aviation services. *Id.* at 144, 148. Similarly, the fixed cost of a telecommunications satellite is diluted over additional customers when it links not one city-pair but multiple cities up to its capacity. Similarly, a law firm may further dilute fixed costs such as staff, leases, and a library by providing multiple types of legal services, thereby expanding the number of clients that may be served using these same fixed costs. *See generally id.* at 170-72.

288. A "hub" airport is "a switching point where passengers can make several alternative connections." *Id.* at 20; *see* BERNT & WEISS, *supra* note 2, at 95-96 (observing hub phenomenon in international telecommunications services).

289. For instance, the hub-and-spoke technique allows an airline to fill aircraft and the hub airport terminal with passengers desiring connecting service through the hub city, in addition to those whose final destination will be the hub itself. Further, the fixed investment cost of an aircraft may be diluted over additional passengers when it serves multiple destinations: instead of being idle when not needed to serve one destination, it can earn additional revenue by then serving others. *See generally* WEISMAN, *supra* note 21, at 22, 36-37. This source of scope economies is likewise not limited to the commercial aviation sector. *Id.* at 32, 52, 170. For instance, the fixed cost of a satellite ground station may be diluted over additional users when it collects signals from multiple points of origin for transmission through the satellite, instead of linking merely one spoke of the network with the satellite. Similarly, attorneys specializing in different fields may dilute fixed costs such as libraries and support staff over clients seeking many different types of services by aggregating in a law firm.

290. *See supra* part III.A.

291. *See generally* DOUGLAS F. GREER, *INDUSTRIAL ORGANIZATION AND PUBLIC POLICY* 118-19, 156-69 (2d ed. 1980); *see also* OECD, *supra* note 33, at 12; Loughlin Interview II, *supra* note 67.

consumers in addition to services producers.

Services trade liberalization thus presents the danger of creating powerful private actors that, first, will seek to reap the efficiency gains allowed by liberalization for themselves without sharing them with services consumers and, second, will erect barriers to trade and competition in place of those that governments remove.²⁹² The German *Monopolkommission* has even argued that, once attained, "private market power is always directed to restricting competition, as this is the only means by which it is sustainable."²⁹³ Apart from the specific dangers relating to the rise of oligopolies in services industries, international policies advancing competition are beneficial for essentially the same economic reasons militating in favor of elimination of governmental restrictions upon international trade.²⁹⁴

Because of such considerations, the GATS encourages governments to address private anticompetitive behavior restricting international trade.²⁹⁵ Unfortunately, the GATS provision is phrased in permissive, not mandatory, terms.

2. *European Merger Control Regulation*

Unlike the GNS, the European Commission (Commission) recognized the urgent relevance of competition policy to trade liberalization in its implementation of the 1992 Single Market project. The Commission insisted that the 1992 Single Market project include a Merger Control Regulation (Regulation)²⁹⁶ because of the allocative concerns articulated above.²⁹⁷ The Commission firmly rejected *dirigiste* statist models and intended private firms to achieve the integration of EU markets across Europe by merging and trading with other firms, in pursuit of the estimated ECU 200 billion in efficiency gains expected from the establishment of the Single Market.²⁹⁸

Yet if the corporate mergers enabled by the elimination of intra-EU NTBs could proceed without supervision by a competition policy of merger control, the benefits of EU integration would accrue disproportionately to businesses

292. Gibbs & Mashayekhi, *supra* note 32, at 92 (noting LDC fears of "recognized restrictive business practices" by multinational corporations "amount to serious barriers to trade"); Jackson, *Future Institutions*, *supra* note 2, at 24; Loughlin Interview II, *supra* note 64; Nayyar, *supra* note 23, at 44; Nicolaides, *supra* note 6, at 133; *see also* MONOPOLKOMMISSION, *supra* note 2, para. 1112.

293. MONOPOLKOMMISSION, *supra* note 2, para. 1112 (translation by author).

294. *See, e.g.,* Pastor, *supra* note 33 (arguing that competition lowered intra-US and intra-EC telecommunications rates and would likewise lower trans-Atlantic telecommunications rates, if introduced in that market).

295. *See* GATS, *supra* note 8, art. IX. Despite Article IX, the EC Commissioner for competition policy, Karel Van Miert, states "[O]ne should not even dream about a worldwide and independent competition agency at this stage." Williams, *supra* note 10, at 7.

296. Council Regulation No. 4064/89, 1989 O.J. (L 395).

297. *See generally* Tycho H.E. Stahl, *Competition-Oriented Merger Control: A Tool For Unifying the European Community*, 14 INT'L MERGER L. 15 (1991).

298. *See generally* MONOPOLKOMMISSION, SONDERGUTACHTEN 17: KONZEPTION EINER EUROPÄISCHEN FUSIONSKONTROLLE 4-5 (1989).

and not to consumers.²⁹⁹ The Commission sought the Regulation in order to prevent such a one-sided allocation of benefits.³⁰⁰ This reasoning and the experience of EU integration are relevant to the larger-scale project of liberalizing international services trade.

V. CONCLUSION

The General Agreement on Trade in Services was completed and opened for signature on December 15, 1993 as part of the GNS, which was conducted in parallel with the Uruguay Round of GATT negotiations. The GATS represents an idealistic, laudable effort to apply the GATT approach to trade liberalization to services trade, an area of economic activity that is crucial particularly to the United States and other DCs. Efforts to liberalize services trade via the GATS, while worthy of support as they continue over the coming decades, do not represent an optimum approach and ought to be supplemented, as other avenues for pursuing services trade liberalization can achieve more immediate and tangible results.

First, the GATT has been applied exclusively to trade in goods, which differ from services in important respects. Production and trade in services represent by far the dominant component of the economies of developed countries like the United States. Services are intangible processes that are often traded via interaction between producers and consumers in cross-border movements of capital assets or personnel. Not surprisingly, then, services and services trade are also difficult to quantify and to measure. Unlike most goods, services are subject to extensive government regulation under highly technical, detailed, idiosyncratic and sector-specific regulatory regimes administered by specialized government agencies.

Second, the approach of the GATT, and consequently also that of the GATS, is flawed. The general philosophy behind the GATT and the GATS, that trade liberalization generally benefits the nations of the world, is sound, so long as one considers allocational issues, both between more and less developed states and between producers and consumers. The legal rules by which the GATT-based approach seeks to implement its philosophy of trade liberalization, however, also invite criticism.

The MFN obligation of the GATT-based approach creates disincentives to liberalization because of its unconditional nature. The national treatment rule does not by itself remedy the highly technical, detailed, idiosyncratic and sector-specific regulatory regimes that impede trade in services sectors. The dispute resolution mechanism of the GATT, which served as the model for the corresponding mechanism incorporated in the GATS, is beset by difficulties: its orientation towards international consensus reduces its effectiveness in

299. *Id.*

300. *See generally* Stahl, *supra* note 297.

resolving trade disputes, and the infrequency of its application renders it irrelevant to the majority of the myriad trade disputes that arise. Finally, perhaps the most significant difficulty with the GATT-based approach of the GATS is its all-inclusive multilateralism.

A comprehensive treaty with rules that simultaneously govern most nations and most industries will not yield optimum results within a reasonable time frame. This Article argues that a project to liberalize trade in services should carefully specify the participating states, the rules to which the states agree, and the industrial sectors covered, as necessary to choose participants united by common interests. Only then will liberalization discussions achieve relatively rapid, incremental, progressive liberalization wherever it is possible. Besides such a rule of targeted multilateralism, this Article proposes that liberalization agreements include effective, adjudicatory dispute resolution mechanisms, conditional MFN obligations, multiple tiers of membership, and a competition policy.

This Article is founded in the hope that the industrial economies of the developed world and, in particular, the United States, the European Union, and Japan, are committed to services trade liberalization and not just to the exploitation of their neighbors in pursuit of short-term goals. Given that the grant of access to U.S. and other industrial markets is a valuable benefit, these states are in a position to assume a leadership role in pursuing services trade liberalization. Indeed, if this proposal proves to be successful, it may in turn provide an impetus to reform the GATT regime governing trade in goods.

